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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5835

WILLIE LEWIS MACK, PETITIONER

VS.

STATE OF ALABAMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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The petitioner, WILLIE LEWIS MACK, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this proceeding on August 24, 1979 and application for rehearing overruled on September 28, 1979.

OPINIONS BELOW

The unreported opinions of the Alabama Court of Criminal Appeals and the Alabama Supreme Court are attached hereto as Appendix A and B, respectively.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on August 24, 1979. A timely application for rehearing was overruled on September 28, 1979; this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether it is a denial of equal protection and due process for a State trial court to single out and accord special treatment to an indigent black defendant and deny him the opportunity to give limited testimony against the voluntariness of an alleged confession without subjecting himself to cross-examination on the entire case when that is the established law in the State, and by silence the State appellate Courts refused to vindicate his right to the same yet secured it for all other defendants.

2. Whether petitioner's death sentence deprives him

of life without due process of law in violation of the Fourteenth Amendment, or constitutes a cruel and unusual punishment prohibited by the Eight and Fourteenth Amendments, because it was imposed pursuant to Alabama's post-Furman, pre-Gregg enactment governing capital prosecution and sentencing, which has the following features.

(a) Lesser included offenses, although supported by the evidence, can not be submitted to the jury in a capital prosecution, with the result that the jury must either convict the defendant of the capital crime or acquit him altogether.

(b) The jury is required automatically to "fix the punishment at death" whenever it convicts the defendant of the capital crime charged.

(c) The defendant's only outlet form this mandatory jury-fixed death sentence lies in the power of the trial judge to "refuse to accept the death penalty as fixed by the jury" after conducting a post-verdict heraing and "after weighing the aggravating and mitigating circumstances" as well as the "fixing of the punishment at death by the jury".

(d) The jury has no voice in the process of determining the propriety of the death sentence upon the facts of the particular case, other than to fix the mandatory death sentence which the judge must reduce in order to spare the defendant's life.

(e) Indeciding whether to reduce or to accept the mandatory jury-fixed death sentence, the judge may consider in mitigation of that sentence only seven statutorily enumerated "mitigating circumstances", and may not give independent consideration to other mitigating evidence.

3. Whether the post-verdict hearing in petitioner's case was so unfocused and inadequate as to render the resulting judgment of death violative of the Eighth and Fourteenth Amendments.

4. Whether petitioner's conviction, as well as his death sentence, was obtained in violation of due process by reason of the Alabama statutory privision (described more fully in Question 2 (a) prohibiting the submission of evidentially supported lesser included offenses to the jury in a capital prosecution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eight and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Alabama law.

TITLE 13, CODE OF ALABAMA (1975)

CHAPTER II

Death Penalty and Life Imprisonment without Parole.

§13-11-1. LIMITATION ON IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE

Except in cases enumerated and described in Section 13-11-2 neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in cases and in the manner herein enumerated and described in 13-11-2. In all cases where no aggravated circumstances enumerated in Section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, §1.)

§13-11-2. AGGRAVATED OFFENSES FOR WHICH DEATH PENALTY TO BE IMPOSED; FELONY-MURDER DOCTRINE NOT TO BE USED TO SUPPLY INTENT; DISCHARGE OF DEFENDANT UPON FINDING OF NOT GUILTY; MISTRIALS; REINDICTMENT AFTER MISTRIAL.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendatn is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Wilful setting off or exploding dynamite or other explosive under circumstances now punishable by Section 13-6-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoened to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendatn must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried against for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, §2).

§13-11-3. HEARINGS AS TO IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE AFTER CONVICTION; ADMISSIBILITY OF EVIDENCE; RIGHT OF STATE AND DEFENDANTS TO PRESENT ARGUMENTS

If the jury finds the defendant guilty of one of the aggravated offenses listed in Section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, §3).

§13-11-4. DETERMINATION OF SENTENCE BY COURT; COURT NOT BOUND BY PUNISHMENT FIXED BY JURY.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it sahll set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in Section 13-11-6, which it finds exists in the case and which it finds sufficient to support the setence of death; and

(2) Any of the mitigating circumstances enumerated in Section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, §4.)

§13-11-5. CONVICTION AND SENTENCE OF DEATH SUBJECT TO AUTOMATIC REVIEW.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, §5.)

§ 13-11-6. AGGRAVATING CIRCUMSTANCES.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence or imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendnat knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, §6.)

§13-11-7. MITIGATING CIRCUMSTANCES.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minr;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, §7.).

§13-11-8. APPOINTMENT OF EXPERIENCED COUNSEL FOR INDIGENT DEFENDANTS.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no

less than five (5) years prior experience in the active practice of criminal law. (Acts 1975, No. 213, §8.)

§13-11-9. EFFECTIVE DATE.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, §10.)

STATEMENT OF THE CASE

On April 28, 1977, Floyd Miller Zeigler operated a business in Greenville, Alabama known as the Zeigler Hardware Store. Around noon of that day, Ray Moody, Chief of Police of Greenville, Alabama received a telephone call to proceed to Zeigler's place of business. (R. 242).

Upon arrival the Chief found Mr. Zeigler, hereinafter referred to as the victim, lying on the floor, close to the cash register, in a semi-conscious condition, bleeding from the head and trying unsucessfully to get up off the floor. (F. 234). He later died from the wound inflicted on him.

Chief Moody testified that a gun cabinet had been broken into and there were vacancies on the cabinet shelves where the victim kept his gun inventory. (R. 251). Pictures of the pistol cabinet were introduced which showed the hasp broken and suggested that pistols had been stolen because of the disarray of the weapons left.

Linda Gail Lewis testified that on the day the victim was killed, she was sitting in a chair in the frontyard of her home in Greenville when the defendant came by in a white coverall suit with a sack in his hand. She said the defendant had a radio and told her he had a gun in the sack. (R. 293). On cross-examination, this witness testified it was on September 3, 1977, when she was the defendant. (R. 299).

Voncile Taylor testified that on the day the victim was killed, she saw the defendant, whom she knew, walking down a Greenville Street. She said she was twenty (20) feet behind him when he dropped a brown paper bag containing some guns. The defendant stopped and retrieved the guns but allegedly left a pistol which the witness picked up and carried home. (R. 304).

This weapon was later identified as one purchased by the victim and allegedly taken from his store during the alleged robbery on April 28, 1977. (R. 347-361).

Kitty Harris Chambers and other witnesses testified that the defendant gave them pistols on the day the victim was killed. (R. 276, 377 and 380) These weapons were subsequently given to the police. (R. 380).

Police Chief Moody, the Sheriff of Butler County, Alabama, two (2) deputy Sheriffs from Montgomery County and two (2) detectives from the City of Montgomery arrested the defendant in the city of Montgomery on May 31, 1977 (R. 410.)

Moody testified that en route from Montgomery to Greenville, the defendant, after having been advised of his rights, decided to make an oral statement admitting the robbery and killing of the victim. (R. 434).

On the trial of this cause, the defendant offered to take the stand for the limited purpose of refuting the alleged voluntariness of his so-called confession. The trial court ruled that should the defendant take the stand for any purpose, he would be subject to cross-examination on the entire case. The defendant duly excepted and declined to testify under the conditions imposed by the Court.

After deliberation, the jury empaneled to try this case, returned the following verdict:

> "We, the jury, find the defendant, WILLIE LEWIS MACK, guilty of robbery with aggravated circumstances by the defendant as charged in the indictment and fix his punishment at death. (R. 478).

On February 1, 1978, the trial court without benefit of a formal hearing as required by law, entered an order affirming the death sentence set by the jury. (R. 56.)

On July 25, 1978, the Alabama Court of Criminal Appeals remanded this cause and ordered ". . .the Circuit Court of Butler County to make a full and complete written finding as to the aggravating and mitigating circumstances after the hearing is conducted with the defendant and his attorneys present".

That Court also held that the Alabama Death Act was constitutional and ". . .is no longer in open question in this State."

Inexplicably, the Court of Criminal Appeals declined to rule on the defendant's charge that it was reversible error to deny him the opportunity to give limited testimony against the alleged voluntariness of a confession without subjecting himself

to cross-examination on the entire case.

This issue was properly reserved in the trial record, briefed and argued orally before the Court of Criminal Appeals. That Court pointedly ignored this argument and quoted authority long since overruled by that Court and the Alabama Supreme Court. (See Appendix A).

On December 28, 1978, the trial Court held the hearing mandated by the Court of Criminal Appeals and entered the following order:

> "The Court therefore finds that there were no substantial mitigating circumstances in connection with this offense and that the aggravating circumstances far out weigh any mitigating circumstances and that the death sentence was warranted under all the surrounding circumstances. (Supplemental R. 11).

On February 26, 1979, the Court of Criminal Appeals affirmed the trial Court's judgment and denied defendant's petition for rehearing.

On Mary 12, 1979, the defendant petitioned the Supreme Court of Alabama for a Writ of Certiorari and alleged a number of errors in the trial. One of the alleged errors is as follows:

(1) That the refusal of the Court of Criminal Appeals to rule on defendant's right to give limited testimony against the voluntariness of an alleged confession without subjecting himself to cross-examination on the whole case was in conflict with its own prior decisions and decisions of the Supreme Court of Alabama. (See Appendix B).

On August 24, 1979, the Supreme Court of Alabama, in an opinion containing only two (2) sentences, affirmed the judgment of the Court of Criminal Appeals. In this death case, the highest Court in Alabama gave no reasons for its decision and joined in the unconstitutional silence of the two (2) lower courts.

On September 7, 1979, the defendant filed an application for rehearing and a copy of the same is attached hereto as Appendix C. The Supreme Court of Alabama overruled defendant's petition for rehearing. His execution was set for January 4, 1980. The Supreme Court of Alabama denied defendant's Motion to Stay the Order of Execution pending an appeal to this Court. (See attached Appendixs D and E). The defendant effected his appeal to this Court within ninety (90) days of the denial of his petition for rehearing by the Supreme Court of Alabama.

HOW THE FEDERAL CONSTITUTIONAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioners federal constitutional challenges to the Alabama statutory procedures governing prosecution and sentencing in capital cases, and to their application in his particular case, were briefed before the Alabama Court of Criminal Appeals and before the Alabama Supreme Court and were rejected on the merits by both courts with dissents.

Petitioner's specific contention that it was a denial of equal protection and due process to refuse him the right to give limited testimony against the voluntariness of an alleged confession without subjecting himself to examination on the whole case was briefed and argued orally before the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Both Courts ignored their own prior holdings and refused to rule on this issue though they have ordered new trials for other defendants on this precise point in similar cases.

REASONS FOR GRANTING THE WRIT

1. The two (2) highest Courts in Alabama have unconstitutionally closed their eyes to their own prior holdings in order to facilitate the execution of one black man, Willie Lewis Mack. It isn't that the Courts overruled their prior holdings, rather, by silence, they withdrew from him the protections of their prior holdings. These protections continue to be available to all other defendants in Alabama.

If this judgment is allowed to stand it will make a mockery of a black man's federal right to due process and equal protection of the law in the Courts of Alabama.

INTRODUCTION

In this case, the defendant offered to take the stand for the limited purpose of testifying against the alleged voluntariness of a so-called confession offered as evidence against him.

The defendant's offer was conditioned upon the request that cross-examination of him be limited to that point. The trial court ruled the defendant would be open to cross-examination on all matters in the case should he take the stand for any purpose Such a ruling has been reversible error in Alabama for more than a decade.

In Duncan v. State, 176 So.2d. 840, the Alabama Supreme Court made the following statement, to-wit:

> "We are clear on the conclusions that whenever a motion is made for the question of the voluntariness of the confession to be determined outside the presence of the jury, the trial judge sitting alone should make a determination upon a proper record of the issue of voluntariness. At such a hearing the defendant may take the stand and testify for the limited purpose of making a record of his version of the facts and circumstances under which the confession was obtained. By so doing, the defendant will not waive his right to declien to take the stand in his own defense on the trial in chief nor will he waive his choice not to testify. If the confession is held voluntary and admitted, the jury's consideration of that confession and surrounding circumstances shall proceed in accordance with the "orthodox" procedure that is the jury considers the weight or credibility of the confession. (Emphasis ours).

In Isbell v. State, 202 So.2d. 555, the Alabama Court of Criminal Appeals said, viz:

> "On the trial, at a hearing held out of the presence of the jury to determine the voluntariness of defendant's confession, the trial court refused to permit the defendant to testify to the facts and circumstances surrounding the giving

> of the confession, without subjection himself to cross-examination "as to all the facts of the case". This was reversible error. (Emphasis ours).

This is the law in Alabama to all defendants except Willie Lewis Mack. This question was briefed and argued before both Alabama appellate courts. Neither would rule on the issue.

In fact, in oral argument, the members of the Alabama Supreme Court agreed it was reversible error. Yet the members did not mention that issue when they subsequently handed down their opinion.

- U. S. v. Lynch, D. C. Ga. 1950, 94 F. Supp. 1011, aff'd 189 F.2d 476, cert. den. 72 S. Ct. 50, 342 U.S. 831, 96 L.Ed. 629 states:

> "Equal protection of the laws includes the right to be tried and punished in the same manner as others accused of crime are tried and punished.

In Backus v. Fort St. Union Depot Co., 18 S. C. 445, 169 U. S. 571, the Court stated:

> "An act of the legislature which in terms gave to one individual certain rights, and denied to another similarly situated the same rights, might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws". Similar reasoning would necessary follow with respect to judicial interpretations of laws.

Griffin v. People of State of Ill., Ill. 1956, 76 S. C. 585, 351 U. S. 12, 100 L.Ed. 891, 55 Ala. R. Ed. 1055, rehearing den. 76 S. C. 844, 351 U.S. 958, 100 L.Ed. 1480 states:

> "Constitutional guarantees of due process and equal protection clause both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.

2. THE DECISION OF THE ALABAMA SUPREME COURT UPHOLDING THE CONSTITUTIONALITY OF ALABAMA'S STATUTORY DEATH-SENTENCING PROCEDURE DECIDES SUBSTANTIAL AND LITERALLY VITAL FEDERAL CONSTITUTIONAL QUESTIONS IN A MANNER THAT IS INCONSISTENT WITH THE APPLICABLE CAPITAL PUNISHMENT DECISIONS OF THIS COURT

In Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion), this Court recognized that "each distinct system (of procedures for the administration of capital punishment) must be examined on an individual basis". Alabama's statutory scheme is markedly unlike any of those that the Court has yet considered. The question of its constitutionality divided the Alabama Supreme Court below, and should plainly be reviewed by certiorari here before petitioner is put to death under it.

A. INTRODUCTION

In 1975, the Alabama legislature, responding to its perceptions of the mandate of Furman v. Georgia, 408, U. S. 238 (1972), enacted the death penalty statute that is now found in Sections 13-11-1 to 13-11-9 of the Code of Alabama (1975). Passed as it was without the benefit of this Court's opinions in the 1976 death penalty cases,[1] the statute combines the worst features of mandatory death sentencing and of inadequately channeled discretionary death sentencing.

The Alabama death penalty law decrees death for certain "aggravated offenses."[2] At trial of the issue of guilty, the jury must either convict the defendant of the aggravated (capital) offense or acquit him completely because the statute provides that a capital offense "shall not include any lesser offenses". §13-11-2(a). If the jury finds the defendant guilty of an aggravated offense, "it shall fix the punishment at death". Id. The trial judge is then equired to hold a hearing to determine whether he will "refuse to accept the death penalty as fixed by the jury" and will instead sentence the defendant to life imprisonment without parole. §13-11-4. After weighing the statutorily enumerated aggravating and mitigating circumstances,[3] and "the fixing of teh punishment at death by the jury", the judge "may accordingly sentence the defendant to death," or may reduce the jury-fixed death sentence. Id.

The Alabama statutory scheme is unique. No other American jurisdiction forbids a jury in a capital trial to consider evidentially supported lesser included offenses, requires

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1/ Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976).

2/ Section 13-11-2(a) enumerates the fourteen aggravating allegations which trigger a capital indictment. In the case sub judice, the petitioner was indicted under Section 13-11-2(a)(2), covering roberry or attempted robbery when the victim is intentionally killed.

3/ The aggravating circumstances are found in §13-11-6, and the mitigating circumstances are found in §13-11-7.

the jury either to loose the defendant on the streets or fix his sentence at death and then compels the trial judge to "refuse to accept" the jury's mandatory death sentence if he believes that a sentence of life imprisonment is appropriate. This extraordinary procedure places both judges and juries in an untenable and irresponsible position and in so doing destroys essential safeguards that are constitutionally required in order to assure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).

B. THE STATUTORY PROHIBITION THAT FORBIDS A JURY TO CONSIDER LESSER INCLUDED OFFENSES WHICH MIGHT BE FACTUALLY FOUND IN THE CASE OF A DEFENDANT CHARGED WITH A CAPITAL OFFENSE RAISES SUBSTANTIAL QUESTIONS UNDER THE DUE PROCESS CLAUSE AND THE EIGHTH AMENDMENT.

The submission to the jury of lesser included offenses which are supported by the evidence is a commonplace of American criminal jurisprudence. In Alabama, by statute, the court is required in every murder case to charge on both first and second degree murder.[4/] It is also required to charge on other degrees of homicide, "if there is any reasonable theory which could support the position," Fulghum v. State, 291 Ala. 7, 277 So.2d. 886 (1973).[5/]

Under the death penalty statute, however, the trial jury is precluded from considering lesser included offenses that can factually be found in a capital case. §13-11-2(a). If the jury believes that the defendant has committed some degree of homicide but not capital murder, it is given the Hobson's choice of acquitting a killer or of returning a verdict evidencing the finding of elements about which the jury is not satisfied beyond

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4/ §13-1-73, Code of Alabama (1975). Under Alabama law first degree murder is a wilful, deliberate, malicious and premeditated killing. All other common law murder is murder in the second degree. §13-1-70, Code of Alabama (1975). A person convicted of first degree murder is automatically sentenced to life in prison while a person convicted of second degree murder is sentenced, at the discretion of the jury, to a term of imprisonment of not less than 10 years. §13-1-74, Code of Alabama (1975).

5/ In Alabama, the other degrees of homicide are manslaughter in the first degree and manslaughter in the second degree. §13-1-90, Code of Alabama (1975).

a reasonable doubt, and carrying a death sentence.[6/]

As this Court has noted, the principal reason for the recognition of a defendant's right to instructions on factually supportable lesser included offenses is that:

> [w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205, 212-213 (1973). And when we deal with the "unique and irreversible penalty of death," Woodson v. North Carolina, 428 U.S. 280, 287 (1976) (plurality opinion), a system which unnecessarily[7/] compels the jury to choose either outright acquittal of a serious but doubtfully capital offender or relaxation of the constitutional standard of proof of every element of the capital offense beyond a reasonable doubt[8/] surely demands scrutiny by this Court. For such a system both jeopardizes the capital defendant's due process right to fair factfinding procedures on the issue of guilty, undistorted by impermissible considerations that might lead the trier of fact "'not to hold the balance nice, clear and true between the State and the accused,'" Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972), quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927); cf. Jackson v. Denno, 378 U.S. 368, 386-389 & n.15 (1964), and also threatens to influce the extreme penalty upon the basis of a trial process that is insufficiently reliable in its selection of cases to receive that penalty, see Woodson v. North Carolina, supra, 428 U.S. at 305; Gardner v. Florida, 430 U.S. 349, 357-358 (1977) (plurality opinion). This distortion of both the guilt and sentence determinations merits the scrutiny of this Court.

6/ In the case sub judice, the petitioner was charged with intentional robbery-murder. If the jury believed that the homicide was unintentional, as it might have found from certain evidence, the statute would require the jury to acquit even though it believed that a robbery and an unintentional homicide had been committed, or to disregard the evidence and convict.

7/ Obviously, the only reason for the Alabama legislature's 1975 preclusion of lesser included offenses was its belief that Furman required such a draconian approach. Cf. Lockett v. Ohio, 98 S. Ct. 2954, 2962-2963 (1978) (plurality opinion); Jackson v. State, 337 So.2d 142 (Miss. 1976). This Court's subsequent decision in Gregg v. Georgia, 428 U.S. 153, 199 & n.50 (1976) (plurality opinion), has withdrawn the foundation of that belief.

8/ See, e.g., In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975).

C. THE STATUTORY REQUIREMENT THAT THE JURY IMPOSE A DEATH SENTENCE UPON EVERY CONVICTION OF CAPITAL MURDER RAISES SUBSTANTIAL QUESTIONS UNDER THIS COURT'S DECISIONS INVALIDATING MANDATORY DEATH PENALTY SCHEMES.

As previously noted, the Alabama death penalty statute requires the jury to "fix the punishment at death" whenever it convicts a defendant of a capital offense. §13-11-2(a). The mandatory character of this jury-fixed death setence taints Alabama's capital trial procedures with one -- although admittedly not all -- of the vices which this Court condemned in Woodson v. North Carolina, 428 U.S. 280, 302-303 (1976) (plurality opinion), and Stanislaus Roberts v. Louisiana, 428 U.S. 325, 334-335 (1976) (plurality opinion). Under the Alabama scheme, "it is only reasonable to assume that many juries. . .will continue to consider the grave consequences of a conviction in reaching a verdict," Woodson v. North Carolina, supra, 428 U.S. at 303, and so will exercise a "de facto sentencing discretion", Stanislaus Roberts v. Louisiana supra, 428 U.S. at 335, by refusing to convict defendants whom they feel do not deserve to die, even though unquestionably guilty. Indeed, the Alabama Supreme Court below made exactly this assumption, and gave it the stamp of state judicial approval:

> "We are further convinced that trial juries will consider the serious consequences of a guilty verdict and will either refuse to fix the penalty at death, or will acquit the defendant.

(App A, p. 6, infra.) Thus the question is squarely presented whether this "separate deficiency", Woodson v. North Carolina, supra, 428 U.S. at 302, which the Court relied upon to invalidate the North Carolina and Louisiana statutes, also invalidates Alabama's.

That question palpably merits certiorari. For in Alabama as in North Carolina and Louisiana, the demand that the jury declare for life or death by its vote on innocence or guilt has "simply papered over the problem of unguided and unchecked jury discretion" and failed to "fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize,and make rationally reviewable the process for imposing a sentence of death". Woodson v. North Carolina, supra, 428 U.S. at 302, 303.

It is no answer to say, as the Alabama Supreme Court has said, that the post-jury-verdict judicial hearing on agravating and mitigating circumstances remedies this deficiency. Certainly this judicial hearing will not lessen the arbitrariness of the jury's decision. In the first place, the jurors may not even be aware that such a hearing exists. If the jurors do know about it, their knowledge certainly will not inform or guide their deliberations in any regular or reviewable channels. The jury's willing unwillingness to subscribe to a death verdict can still express itself only "lawlessly" under the guise of a guilt/innocence determination, Woodson v. North Carolina, supra, 428 U.S. at 303,[9/] and be formed only upon the record of the trial of guilt or innocense, lacking as it usually is in "[m]uch of the information that is relevant to the sentencing decision", Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). Such speculation as the jury may indluge in regarding the trial judge's possible reduction of its verdict introduces nothing but an additional dimension of vagary into the process.

In the second place, the jury's sense of accountability is likely to be attenuated by whatever knowledge it may have of the judge's power to reduce the sentence it has "fixed". The entire sentencing process is not thereby made more reliable, but less responsible. For, as we shall see in the following subsection of this petition, the Alabama procedure strongly inclines the judge to accept, not "refuse to accept", the jury's death verdict. The prospect of each nominal sentencing agent deferring to the other while the defendant suffers the death sentence that is statutorily required to be fixed in the jury's verdict holds no promise of either reliability or responsibility.

Finally, the trial judge does not review the jury's verdict in any sense. He has not more capability than his North Carolina and Louisiana counterparts had to "check arbitrary and capricious exercise of [the jury's]. . . power," Woodson v. North Carolina, supra, 428 U.S. at 303. If the jury votes for death, he may choose to supersede it; but his choice cannot be made upon

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9/ The majority opinion of the Alabama Supreme Court below admits, as it must, that "the jury obviously is not provided with guidelines to aid it in fixing the punishment; in fact, the statute directs the jury, if it finds the accused guilty, to fix the punishment at death. The jury has no discretion to fix any other penalty". (App. A, p. 4. infra.)

the basis of any understanding of its unfathomable verdict. In short, as Justice Jones wrote in dissent below, the judge's "subsequent consideraiton of mitigating factors cannot rectify the unconstitutionally unreliable sentence already imposed". (App. A., p. 11, infra.)10/

D. THE STATUTORY PROCEDURE WHICH DEFERS CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL AFTER A JURY HAS IMPOSED A SENTENCE OF DEATH -- THUS PLACING THE TRIAL JUDGE WHO MUST WEIGH THEM IN THE POSITION OF HAVING TO REDUCE A JURY-FIXED DEATH SENTENCE IF HE CONCLUDES THAT THE DEATH PENALTY IS INAPPROPRIATE TO THE CASE -- RAISES SUBSTANTIAL QUESTIONS UNDER THE DUE PROCESS CLAUSE AND THE EIGHT AMENDMENT.

It is clear that "in capital cases the fundamental respect for humanity underlying the Eight Amendment. . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, 428 U. S. at 304. Thus, one obvious distinction between the statutes upheld and those struck down in the Court's 1976 death penalty decisions (see note 4 supra) is that the former but not the latter provided for a separate pre-sentence hearing.11/

10/ Of course, if one indulges the assumption--contrary to Woodson and Stanislaus Roberts -- that the jury's verdict will not reflect sentencing considerations but will respond entirely to questions of guilty or innocence and to the jury's statutory obligation to fix the punishment upon conviction at death, then the Alabama procedure ineluctably raises the constitutional issue which was included in the grant of certiorari, but whose decision was reserved, in Lockett v. Ohio, 98 S. Ct. 2954, 2967 n.16 (1978): whether juries can be wholly excluded from participation in the sentencing decision. That issue is also raised, albeit in somewhat different form, if the jury's participation in capital sentencing is conditioned upon its "willingness to act lawlessly", Woodson v. North Carolina, supra, 428 U.S. at 303. Alabama juries either have no sentencing power, or they have a lawless and arbitrary sentencing power; in either event, the Court should grant certiorari here to decide whether the Eight Amendment or the Fourteenth Amendment requires a State to provide some procedure for properly channeled jury input in the capital sentencing process. See Brief for Petitioner at 68-83, Lockett v. Ohio, 98 S. Ct. 2954 (1978).

11/ Although the court did not explicitly command such a hearing, it seems unlikely that the court's requirement, that the nature of the offense and character and record of the offender be given individual consideration in the sentencing determination, could be met without the provision of a separate sentence hearing. See The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 73 n.71 (1976).

It is also clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . .[because] [t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have not right to object to a particular result of the sentencing process." Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion). Any capital sentencing procedure, then, must assure "reliability in the determination that death is teh appropriate punishment in a specific case," Woodson v. North Carolina, supra, 428 U. S. at 305; and it must comport with fundamental fairness, Witherspoon v. Illinois, 391 U.S. 510 (1968).

An Alabama trial jduge comes to the "constitutionally indispensable part of the process of inflicting the penalty of death" only after a jury verdict has been publicly pronounced--and publicized--which sentences the defendant to die without considerat ion of mitigating circumstances. The judge is thus placed in the exposed position of having to override the jury's death sentence, and to take the public heat of "refusing to accept" a death sentence, in order to give the defendant the benefit of the sentencing hearing which is his constitutional due. Such a procedure is equivalent, at the sentencing stage, to beginning a trial on the issue of guilt or innocense by publicly proclaiming that the defendant is guilty and that a trial will now be held to determine whether he should be found guilty.

Indeed, Alabama's death-sentencing procedure is worse, because the pre-announced verdice of death carries the imprimatur of a jury of twelve citizens who, in public contemplation, appear to have sat in judgment on the case even though they have not in fact observed federal constitutional standards in fixing the sentence of death--standards which require that the sentencing agency "consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," Jurek v. Texas, supra, 428 U.S. at 271. A procedure which compels the judge to place himself in a publicly unfavorable light in order to do his minimal constitutional

duty[12] is too fraught with peril to be permitted consistently with due process,[13] and too unreliable to pass Eight Amendment muster.

Even if a judge were able and willing to disregard the jury sentence of death, the statute specifically instructs him to consider it. He is directed to weigh "the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury," §13-11-4 (emphasis added). A system which so plainly "stack[s] the deck against" the defendant, Witherspoon v. Illinois, 391 U.S. 510, 523 (1968), results in a distortion of "the balance of forces between the accused and his accuser," Wardius v. Oregon, 412 U.S. 470, 272 (1973). Where the defendant's life is at stake, it also ignores the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, supra, 430 U.S. at 358.

E. THE STATUTORY PROVISIONS WHICH LIMIT CIRCUMSTANCES THAT MAY BE CONSIDERED IN MITIGATION ARE AKIN TO THOSE CONDEMNED IN LOCKETT V. OHIO.

The Alabama statute specifies seven (7) narrowly defined factors which "shall be" mitigating circumstances[14] and which shall be weighed by the trial judge against the aggravating circumstances[15] to determine whether the judge will accept or refuse to accept the jury-fixed death sentence, §§13-11-3, 13-11-4. The mitigating circumstances deal with the defendant's prior criminal record,[16] his mental state at the time of the commission of the crime,[17] his age, and his participation in the criminal act

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12/ Such a process embroils the judge in the passions of the day and forces him to "assume primary responsibility in choosing between competing political, economic and social pressures." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).

13/ Cf. Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). See also Gardner v. Florida, supra, 430 U.S. at 403 ("Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner. . .However acceptable that argument might have been before Furman v. Georgia, it is now clearly foreclosed."); Johnson v. Mississippi, 403 U.S. 212 (1971); Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

14/ § 13-11-7.

15/ § 13-11-6.

16/ § 13-11-7(1).

17/ § 13-11-7(2), (5), (6).

which has resulted in his jury sentence of death.[18]

By the plain language of the statute, the trial judge is not permitted to weigh any non-statutory mitigating circumstances in reachign his decision.[19] Nor has the Alabama Supreme Court construed the statute to permit the consideration of non-statutory mitigating circumstances.[20] In sustaining its constitutionality, the court has relied insteand upon the provision of §13-11-3 which permits the introduction of evidence as to "any matter that the court deems relevant to sentence." (App. A, pp. 13-14, infra.)[21]

Thus a defendant is permitted to offer evidence relevant to sentence; but under the terms of the statute, all such evidence must be considered in relation to the limited statutory mitigating circumstances.[22] This approach to mitigation is indistinguishable from that of the Ohio statute condemned in Lockett, which provided that the death penalty was precluded "when, considering the nature and circumstances of the offense and the history

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18/ §13-11-7(4). The seventh mitigating circumstance deals with the rare situation in which the victim was a participant in his own death. §13-11-7(3).

19/ All references throught the state are to the specific statutory mitigating circumstances. §13-11-3 requires that the trial judge hear evidence relating to the specific statutory mitigating circumstances. §13-11-4 requires that the court weigh "the aggravating and mitigating circumstances" and §13-11-4(2) requires that a trial court support a death sentence by making written findings which shall at least include:

> (2) Any of the mitigating circumstances in §13-11-7 which it finds insufficient to outweigh the aggravating circumstances.

Finally, §13-11-7, in listing mitigating circumstances, contains the following limiting language:

> Mitigating circumstances shall be the following. . .(Emphasis added.)

20/ In his separate opinion below, Chief Justice Torbert writes that "[t]he list of mitigating circumstances in section 13-11-7, Code of Alabama, 1975, is exclusive...."(App. A, p. 9, infra.)

21/ "It is readily apparent, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances." (App. A, pp. 13-14, infra.)

22/ In the case of Ex parte Recardo Cook (Re: Recardo Cook v. State of Alabama), SC 77-320 (Ala. Sup. Ct. Sept. 10, 1978), the Alabama Supreme Court described this shoehorning process as "categorizing the evidence received and balancing the aggravating circumstances with the mitigating circumstances."

character, and condition of the offender, one or more of [three enumerated mitigating circumstances]. . . is established. . . ." Ohio Rev. Code Ann., §2929.04(B)(1975 Repl. Vol.), quoted in Lockett v. Ohio, 98 S. Ct. 2954, 2968 (1978). Notwithstanding that the Ohio Supreme Court had construed this provision to mean that "the sentencing judge or judges may consider factors such as the age and criminal record of the defendant in determing whether any of the mitigating circumstances is established,: id., at 2966, the Ohio procedure was invalidated because it prevented the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," id. at 2965 (emphasis added) This Court furtehr noted that "[n]one of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Id. at 2966. Alabama's statute so operates; and its consistency with Lockett therefore plainly presents a question that the Court should resolve.

F. CONCLUSION

The several features of the Alabama statute described in the preceding subsections of this petition do not, of course, function in isolation. They interact to produce a death-sentencing procedure of uniquely questionable fairness and reliability. Its constitutionality under the Eight and Fourteenth Amendments should therefore be reviewed by this Court.

3. PETITIONER'S POST-VERDICT HEARING WAS SO INADEQUATE AND UNFOCUSED AS TO RAISE THE ADDITIONAL QUESTION WHETHER THE APPLICATION OF ALABAMA'S STATUTORY PROCEDURES IN HIS CASE DEPRIVED HIM OF LIFE WITHOUT DUE PROCESS OF LAW OR SUBJECTED HIM TO CRUEL AND UNUSUAL PUNISHMENT

The endemic vices of the Alabama statutory procedure were compounded by the perfunctory quality of the post-verdict hearing in petitioner's case.

One Justice in the Court of Criminal Appeals and two in the Alabama Supreme Court dissented on the procedures and interpretations involved in the death-sentencing hearing. (See Appendix A.) The Justice pointed out that on the record in this case, the death sentence appears beyond the judicial discretion authorized by the statute.

This Court's Eighth Amendment decisions envisage a death-sentencing process that will adequately "focus the [sentencing authority's]. . .attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Gregg v. Georgia, supra, 428 U.S. at 206. They establish that "the fundamental respect for humanity underlying the Eighth Amendment. . .requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, 428 U.S. at 304. No such focus or consideration marked the procedures by which petitioner was consigned to die. The manifestly substantial question thus presented is whether his death sentence can be squared with the Constitution.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

BY: J. L. Chestnut, Jr.

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Selma, Alabama 36701

ATTORNEY FOR PETITIONER

November 13, 1979

STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1979-80

RECEIVED
1979
Cressman, Sanders & Sanders

EX PARTE WILLIE LEWIS MACK

(In re: Willie Lewis Mack v. State of Alabama)

JUDGMENT AND ORDER FOR EXECUTION

The judgment of the Circuit Court of Butler County imposing the sentence of death upon the appellant, Willie Lewis Mack, having been affirmed by the Court of Criminal Appeals; and the sentence of death imposed by the circuit court and the judgment of the Court of Criminal Appeals having been affirmed, on writ of certiorari, by this Court on [illegible], 1979, and the application for rehearing filed on September 7, 1979, having been overruled on September 28, 1979; and,

The time fixed by the judgment and sentence of the circuit court for execution of Willie Lewis Mack having expired pending the appeal and writ of certiorari, this Court now proceeds to direct the sentence to be executed.

IT IS NOW ORDERED that Friday, January 4, 1980, be fixed as the date for execution of the convict, Willie Lewis Mack, and the convict, Willie Lewis Mack, being now confined in the William C. Holman Unit of the Prison System at Atmore,

IT IS, THEREFORE, ORDERED that the Warden of the William C. Holman Unit of the Prison System at Atmore in Escambia County, execute the order, judgment and sentence of law on Friday, January 4, 1980, in the William C. Holman Unit of the Prison System, by causing a current of electricity of sufficient intensity to cause death to pass through the body of the convict, Willie Lewis Mack, until he is dead; and in so doing the Warden will follow the method prescribed by law.

IT IS FURTHER ORDERED that the Marshal of this Court shall deliver, within five (5) days from this date, a certified copy of this order to the Warden of the William C. Holman Unit of the Prison System at Atmore, in Escambia County, Alabama, and make due return thereon to this Court.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit forthwith a certified copy of this order to the following: the Governor of Alabama, the Clerk of the Court of Criminal Appeals, the Attorney General of Alabama, the State Commissioner of Corrections, the attorney of record for Willie Lewis Mack, and the Clerk of the Circuit Court of Butler County, Alabama, by United States mail, postage prepaid.

* * * * * * * * * *

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the judgment and order of the Supreme Court of Alabama directing the execution of the death sentence of Willie Lewis Mack, as the same appears of record in this Court.

Given under my hand and the seal of this Court on this the 15th day of December, 1979.

J. O. Sentell, Clerk
Supreme Court of Alabama

AUG 24 1979

RECEIVED
AUG 27 1979
Cleveland, Sanders & Sanders

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1979

Ex parte: Willie Lewis Mack

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

In re: Willie Lewis Mack

v.

State of Alabama

JUSTICE.

We granted certiorari to review petitioner's judgment of conviction, which fixes his punishment at death.

After studying the record, briefs, and listening to the arguments of counsel, we are of the opinion that the judgment of the Court of Criminal Appeals affirming the judgment of the trial Court is correct and it is hereby affirmed.

AFFIRMED.

Torbert, C.J., Bloodworth, Maddox, Faulkner, Shores and Embry, JJ., concur; Beatty, J., with whom Jones, J., joins, concurs in result and dissents in part.

, JUSTICE (concurring in part and dissenting in part):

I would affirm the decision of the Court of Criminal on all issues except that dealing with the trial findings on aggravating circumstances. On that believe that the views of Beddow, J., are correct

Jones, J., concurs.

The Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument herewith set out as appears of record in said Court.
Witness my hand this 22 day of Aug, 1979

J. O. Smith

Supreme Court of Alabama

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THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1977-78

Willie [illegible] Mack

v.

[illegible]

Appeal from Butler Circuit Court

[illegible], PRESIDING JUDGE

Appellant was convicted of murder during the course of robbery in which the victim was intentionally killed by defendant. The jury returned a verdict finding the defendant guilty as charged in the indictment and fixed his punishment at death. Throughout the trial proceedings he was represented by court-appointed counsel who represents him on this automatic appeal. The case went to the jury on pleas of not guilty and not guilty by reason of insanity.

Prior to arraignment appellant filed eleven pre-trial motions. All of these motions were filed on the same day and the trial court set a date to take testimony, hear arguments, and rule on each motion. Briefly, the motions were as follows:

1. To suppress defendant's statements.
2. To quash indictment because of discrimination in jury selection.
3. To inspect, examine and test physical evidence.
4. For information necessary to receive a fair trial.
5. To quash jury venire.
6. To sequester jurors during voir dire.
7. To suppress evidence.
8. To quash indictment because statute unconstitutional
9. To challenge composition of petit jury.
10. Challenging "death qualifications" voir dire questions.
11. To compel disclosure re: tangible evidence.

The State filed answers to each of these motions which denied most of the allegations, admitted a few, objected to many on the ground that appellant was not entitled to the information sought, and moved that the motions be stricken or denied.

Appellant did not take up these motions in the order in which they were filed but took up the motion to quash the jury venire before going to the other motions. We will treat the motions in the order they were presented to the trial court.

The first witness called by appellant on the motion to quash the jury venire was Honorable Jesse O. Bryan, District Attorney of Butler County, Alabama.

In sum, he testified that he had been District Attorney since 1969 and since that time he had assisted the grand jury about twenty times including two or three special grand juries. He stated that the population of Butler County was approximately thirty percent black and seventy percent white. He said he has not known of a black being foreman of a grand jury but knows that blacks served as foremen on two special juries during his tenure of office.

He further testified that women served as foremen of grand juries on two occasions that he could definitely recall. He stated that he had never registered a complaint with the jury commissioners as to the composition of the jury rolls and jury box of Butler County since he took office, and that he had not noticed any radical change in the make-up of the grand and petit juries in the past five years. He has not struck the jury panel for the trial of cases but assigns that duty to the Assistant District Attorney. He said the three jury commissioners were white and he had never known a black to be appointed to the Jury Commission of Butler County.

He stated he showed the present commissioners the pretrial motions filed by appellant's counsel so that they would know what was alleged in the various motions.

John S. Andrews, Assistant District Attorney, was called by appellant as a witness on this motion to quash the jury venire.

He testified that he was County Solicitor of Butler County in 1970 and continued in that capacity until January, 1972, when he became Assistant District Attorney by operation of law. He stated that he has been striking juries in Butler County since 1970 and has not noticed any drastic or great changes in the composition of the jury venires during that period of time. He does not attend the sessions of the grand juries.

He further testified that he knew the jury commissioners [illegible] he had never had any conversations with them concerning [illegible] grand or petit juries; that he had not discussed with the [illegible] commissioners the various motions filed by appellant in this [illegible]. He stated he did not know the population of Butler [illegible] in terms of race -- black and white.

Mr. [illegible] Phillips, a jury commissioner, testified that [illegible] was [illegible] years of age and lived on Route 1, Georgiana, [illegible] County, Alabama. He was appointed to the commission [illegible] Governor and had served for the past fifteen years. He testified that Mr. Zell Pope was the Chairman of the Jury [illegible] Commission. He stated it was the duty of the commissioners [illegible] visit every beat in the county seeking qualified persons [illegible] duty was that they did not discriminate against [illegible] race, blacks or whites, women or age groups from 19 years [illegible] age to 65 years of age. He did testify that most of the [illegible] year olds were still in school and were out of the county [illegible] he understood they had to live in Butler County. He [illegible] further stated they tried to get as many qualified persons just [illegible] over 65 years of age because most of the 65 year old people [illegible] claim their exemption and this would cost the county [illegible] necessary money. He stated that the week before this case [illegible] they got [illegible] into four beats in the Eastern part of the [illegible] went to the Clerk of the Jury Commission along with Mr. [illegible] Willis, who was also a commissioner, and asked people [illegible] give them the names of qualified persons for jury service [illegible] they got the names of forty or fifty persons they considered were fit for jury duty from one beat. He said they [illegible] careful in selecting good citizens for jury duty and [illegible] not even consider putting drunkards and rogues on the [illegible] roll.

Mr. Phillips further testified they would use the [illegible] list which was published in the county newspaper and [illegible] the poll list with the jury roll book to see if the names [illegible] the roll book. Sometimes they would contact persons [illegible] and they were not registered voters, and, therefore, could not serve on the jury. Such persons were told that [illegible] were not disqualified from jury duty because they were not registered voters and their names would be put on the [illegible] roll and in the jury box. In scanning the jury roll [illegible] they came to the name of a person who was dead they would [illegible] that person's name from the jury roll and the jury [illegible]. If they found a name on the voting list and that person [illegible] on the jury roll, they would put his or her name [illegible] book and into the box.

Mr. Sam Owens, a member of the Jury Commission for [illegible] years, testified he had served on the Jury Commission [illegible] five years. He said he would travel in the beats in the west-[illegible] part of Butler County, and the Jury Commission would visit [illegible] various beats once a year in quest of qualified persons [illegible] serve on the jury. He would contact responsible people [illegible] the community and get the names of persons considered [illegible] qualified for jury service and bring the list to the Clerk [illegible] the Jury Commission. All the commissioners would meet and [illegible] over the list before the names were put on the jury roll [illegible] in the jury box; that the last trip he made was in the [illegible] of 1977 and he spent several days interviewing prospective [illegible] jurors to serve on the jury.

He further testified that he had a couple of black [illegible] school teachers who helped him get the names of black males [illegible] black females who were qualified for jury service. One [illegible] black school teachers, Phillip Brooks, taught in the [illegible] public school system, and Mrs. Pressley taught in Georgiana.

[illegible] contacted a black [illegible] owner and operator near [illegible] who cooperated in giving him the names of black [illegible] and females in that community who were considered [illegible] for jury duty; that he told these three sources he would like to have people who could read and write he did not want drunkards. He further said he made a special effort to recruit females of both races and was successful in doing so. He summed up his testimony by saying, "[illegible], when you go out to get your list, it's a heap easier to add to your number by taking males and females both, than just males."

He stated the Jury Commission did not have a legal [illegible] to explain to the Commissioners the duties they were to perform under the law but one of the most prominent lawyers in the Circuit would meet with them and give them advice.

A Methodist minister, Zell Gaston Pope, is the chairman of the Jury Commission of Butler County, and has held the position for three years. He testified the members of the Commission would meet together and divide the areas of the entire county for each commissioner to work in securing the names of qualified persons to perform jury service and they would meet in the Circuit Clerk's office to go over their respective lists and put the names on the official jury roll and in the jury box. Before the Judicial Article of the law of this State, the Circuit Clerk was also the Clerk of the Jury Commission. Reverend Pope stated that during the three years that he had been on the Jury Commission, he had been out in the county about twenty times securing the names of qualified persons to serve on the jury. He said the Commission used the voter registration list to assist them in the performance of their duties but he did not use the telephone directory as he knew all the people whose names were in the directory; that he did not check the records in the Tax Assessor's Office or the Tax Collector's Office because he personally knew most of the property owners anyway.

He was asked what criteria he used in looking for prospective jurors and he replied, 'Well, I try to pick them I think are honest and would tell the truth, and would fair.' He said he made no greater effort in recruiting blacks than whites, saying, "When I go into a community, I females and males, and kinds of them," but he did make special effort to recruit blacks. When asked why, he replied:

> "Well, because, for instance, one day I remember going to Chapman, and we have a whole lot of black people down there. So, I went to the store, and there was a colored woman that runs the store, and there was some man in there, and she told me, said, this is old . . . I forget what his name was, but the fellow knows everybody in the community. So, I asked him would he give me some of the names of the people that would make good jury men and good women. He said yeah, and he give me a great, big long list of names."

He also stated that some of the good lawyers had given the names of eligible people. He said that when names in his list he had made his decision based on the recommendations of the people in the community that they would make good jurymen. He further stated that if any changes were to be made on the jury roll and the jury box those changes would be made in the office of the Circuit Clerk who was also serving as Clerk of the Jury Commission when all the commissioners were present; and that sometimes Mr. Garble was present.

Mr. Bobby Branum, Clerk of the Circuit Court of Butler County, was called as a witness by appellant in support of the motion to quash the jury venire. He testified that prior thereto, in the law he served as Clerk of the Jury Commission but no longer serves in that capacity. He was subpoenaed to bring the jury roll of Butler County to this hearing.

From the record:

> "Q. Were you subpoenaed in this action, sir, and asked to bring some records with you?

"A. I was, and I have them.

"Q. Alright, let me turn, if I might, to the year 1972, and ask you whether or not you have the jury rolls for that year?

"A. I do.

"BY MR. CHESTNUT: If it may please the Court and Mr. Bryan, I understand that these records those jury rolls are the best evidence, but I would like, if the Court would permit, and if you don't object, Mr. Bryan, merely to have him read these figures from these records into the record?

"BY MR. BRYAN: No objection.

"BY THE COURT: Alright.

"BY MR. CHESTNUT:

"Q. Now, looking at the jury roll for the year 1972, in Beat No. 1, Mr. Branum, how many persons served on it? How many persons names are on the jury roll from that Beat?

"A. 131.

"Q. And, that's Beat No. 1?

"A. That's right.

"Q. Of that number, how many are black?

"A. First, let me say that we are reading from a jury roll which is required by Federal Court Order to be kept, in which the jury roll has race indicated on it, the official roll that we have is not does not have the race indicated, but, due to the fact that we, to under the Federal Court Order, we maintained a jury -- a copy of the jury roll with the race indicated, and in answer to your question, 17.

"Q. Now, for Beat No. 2, what's the total number of persons from that Beat on the jury roll?

"A. 57.

"Q. And, how many are black?

"A. 8.

"Q. Alright, I'll ask the same question for each Beat, sir, and if you will, just give me first the figure for the total number of persons from that particular Beat, whose names are on the jury roll, then how many of them are black, Beat No. 3?

"A. Total 20, Black 20.

"Q. Beat No. 4?

"A. Total 31, Black 15.

"Q. Beat No. 5?

"A. Total 40, black 8.

"Q. Beat No. 6?

"A. Total 38, black 9.

"Q. Beat No. 7?

"A. Total 55, black 13.

"Q. No. 8?

"A. Total 71, black 12.

"Q. No. 9?

"A. 77, black 15.

"Q. No. 10?

"A. Total 67, black 49.

"Q. Beat No. 11?

"A. Total 95, black 33.

"Q. No. 12?

"A. Total, 1,028, black, 357.

"Q. Beat No. 13?

"A. Total 77, black 40.

"Q. Beat No. 14?

"A. Total 308, black 100.

"Q. Beat No. 15?

"A. Total 37, black 8.

"Q. Beat No. 16?

"A. Total 84, black 5.

"Q. No. 17?

"A. Total 37, black 12.

"Q. Alright, No. 18?

"A. Total 44, black 4.

"Q. And, beat No. 19?

"A. Total 122, black 19.

"Q. Now, Mr. Brannon, if we go to the year 1972 -- January, 1972, I call the beat number, and if you will, give us the total number of persons from that beat whose names are in the jury box, then the number of blacks.

"Beat No. 1?

"A. Total 57, black 17.

"Q. Beat No. 2?

"A. Total 115, black 34.

"Q. Beat No. 3?

"A. Total 48, black 44.

"Q. Beat No. 4?

"A. Total 23, black 17.

"Q. No. 5?

"A. Total 46, black 7.

"Q. No. 6?

"A. Total 23, black 5.

"Q. No. 7?

"A. Total 28, black 3.

"Q. Beat No. 8?

"A. Total 41, black 16.

"Q. Beat No. 9?

"A. Total 31, black 23.

"Q. No. 10?

"A. Total 53, black 46.

"Q. No. 11?

"A. Total 71, black 40.

"Q. Beat No. 12?

"A. Total 625, black 293.

"Q. No. 13?

"A. Total 65, black 21.

"Q. No. 14?

"A. Total 464, black 107.

"Q. No. 15?

"A. Total 68, black 0.

"Q. No. 16?

"A. Total 132, black 16.

"Q. No. 17?

"A. Total 16, black 1

"Q. No. 18?

"A. Total 104, black 11.

"Q. No. 19?

"A. Total 100, black 13.

"BY THE COURT: Mr. Branum, for the Court's information, would you give me the total number and total number of blacks?

"BY MR. BRANUM: From 1975 Jury Roll, Your Honor, total number on the roll is 2,110. Total number of blacks, 685.

"BY THE COURT: Thank you.

"BY MR. CHESTNUT: Could we put those same figures in for this year, Your Honor?

"BY THE COURT: You mean for '72?

"BY MR. CHESTNUT: Yes, for 1972, Mr. Branum, would you give me those?

"BY MR. CHESTNUT:

"Q. From the Jury Roll 1972, there is 2,377 on the jury roll, and, of that number, 746 are black.

"Q. Now, Mr. Branum, might we go to the year 1976 and again, I shall call out the beat number and ask you to give us the total number of persons in that beat whose names appear in the jury box or on the jury rolls, then give us the number of blacks. After we have completed it, I would appreciate it if you would give us the total numbers and the total number of blacks.

"Beat No. 1?

"A. Total 84, black 12.

"Q. No. 2?

"A. Total 94, black 13.

"Q. No. 3?

"A. Total 29, black 29.

"Q. No. 4?

"A. Total 24, black 12.

"Q. No. 5?

"A. Total 46, black 9.

"Q. No. 6?

"A. Total 35, black 6.

"Q. No. 7?

"A. Total 23, black 6.

"Q. No. 8?

"A. Total 21, black 5.

"Q. Beat No. 9?

"A. Total 41, black 24.

"Q. No. 10?

"A. Total 41, black 27.

"Q. Beat No. 11?

"A. Total 110, black 64.

"Q. No. 12?

"A. Total 1,049, black 385.

"Q. No. 13 -- was that twelve we just finished?

"Beat No. 13?

"A. Yes, total 51, black 29.

"Q. No. 14?

"A. Total 311, black 104.

"Q. Beat No. 15?

"A. Total 41, black 0.

"Q. No. 16?

"A. Total 100, black 22.

"Q. No. 17?

"A. Total 41, black 15.

"Q. No. 18?

"A. Total 119, black 26.

"Q. No. 19?

"A. Total 99, black 23.

"Q. And, the total number of persons in the jury roll?

"A. 2,536, and of those, 808 are black.

"Q. And, that was for the year -- ?

"A. 1976.

"Q. Now, do we have such a compilation for the year 1977?

"A. We do not.

"Q. Alright, what is this large book you have there, sir?

"A. That's the original what I call the original jury roll, and the book that I have been reading the numbers from.

"Q. Are the records kept for the federal court?

"A. That's right.

"Q. Mr. Branum, how long has the federal courts required that this record be kept?

"A. By order of the United States District Court for the Middle District of Alabama, Northern Division, such order dated September 25, 1968.

"Q. Do you mind if I see that, sir?

"A. No, I sure don't.

"BY MR. CHESTNUT: Your Honor, might I have about two minutes?

"BY THE COURT: Yes, sir.

(Thereupon, a short recess was taken, and the proceedings were resumed as follows:

"BY MR. CHESTNUT: Alright, Your Honor, I am ready.

"BY THE COURT: Alright.

"BY MR. CHESTNUT:

"Q. Mr. Branum, since 1968, the Federal Court order has required that a breakdown of the jury roll be maintained on the basis of race?

"A. Among other things, yes.

"Q. What are some of the other things they require?

"A. If I may read from a copy of the order, or, maybe a copy of the agreement which the order is based on, that we maintain a jury roll of approximately twenty-one hundred names, of which, thirty percent must be Negro.

"Q. Did it say anything about female?

"A. It did not.

"BY MR. CHESTNUT: I think that's all, Mr. Branum, thank you.

"CROSS EXAMINATION

"BY MR. BRYAN:

"Q. Mr. Branum, have you figured these up, percentage wise, that 1972 is equal to thirty-one percent; 1975 equal to thirty-one percent; and 1978, thirty-five percent?

"A. Mr. Bryan, I have not computed those figures, except to know that they are over the limit set by the Federal Court Order.

"Q. And, the Federal Court order was thirty percent?

"A. Yes, sir.

"Q. Mr. Branum, you have sat in on those meetings with the other three members of the jury commission when ya'll put the number -- the names and others from the jury rolls, I presume?

"A. Yes, sir.

"Q. Have ya'll ever knowingly, to your knowledge, discriminated against anybody because of race, creed, color, national origin, sex, economic status or age?

"BY MR. CHESTNUT: We object to that question, that's a precise question for which the Court is convened to decide, and he can testify as to what they did or what they did not do, whether or not they discriminated is the question for this Court, not for that witness.

"BY MR. BRYAN: This is cross examination.

"BY MR. BRYAN:

"Q. I'll ask you whether or not, Mr. Branum, you've ever had any conversations to take anybody off of the rolls, to take them off of the rolls because they were black or over 65 or because he was poor?

"A. No, sir.

"Q. Or, female?

"A. No, sir."

At the conclusion of Mr. Branum's testimony appellant's counsel informed the Court that he did not have any more testimony to offer in support of this particular motion.

The State called the Chairman of the Jury Commission and asked him during the three years he had served on the commission whether or not in going out in the community to select names for jury service he took into consideration any person because of race, creed, color, national origin, sex or economic status, and he replied, "no."

On cross-examination Reverend Pope was asked if he was aware that there was a requirement that the jury roll contain, at all times, at least a minimum of thirty percent colored people and he said, "I don't know whether I told anybody we needed thirty percent, we got as many names as we could." He stated the percentage didn't mean anything to him as much as getting the names whether they were white or black. He further said that he was informed that they did not get at least twenty percent colored because evidently the jury roll needed that many to get the right average. They were told to get at least twenty percent more to comply with the Federal Court Order and they tried to get more than that percentage.

Appellant's counsel then told the Court he wanted to adopt all the testimony taken on the motion to quash the jury venire in support of the motion to quash the indictment because of discrimination in the jury selection but that he didn't have anything in addition to offer. The trial court agreed to this proposal.

Appellant then moved to take up the motion challenging the composition of the petit jury and in support of this motion he called Mr. Bobby Branum to the witness stand.

Mr. Branum testified that he was Clerk of the Jury Commission at the time women started serving on the jury and later when 19 year old persons were authorized to serve on the jury. He stated that, when the age limit was lowered to 19, the Commission would get all the qualified citizens 19 years old and up just as they were formerly getting all qualified citizens 21 years of age and up. He said that when the 19 year old age limit was passed the Jury Commission went into session and purged the jury box and added names, and that this was done every year; that when women were ruled qualified and the age limit was lowered to 19, the jury box was completely emptied and they started over with a new jury roll and refilled the jury box.

On cross-examination he testified that the Jury Commission held yearly sessions and they worked fifty days during the period of August 1st to December 20, as required by the State law. They would purge the jury box and make drafts into the various beats in the county to obtain more and new names to go into the jury box.

At the conclusion of this witness's testimony appellant's counsel stated to the Court:

> "Well, what we are saying is that all motions that we have which go to either the petit or the grand jury, that we will not offer any additional evidence, but simply adopt the evidence already into the record, and apply to all those motions so far as those motions relating to the juries. We rest on them, and we are going to excuse all the witnesses called in relationship to them, Your Honor."

Appellant then informed the Court that the next motion he wanted to take up was the one to inspect, examine and test the physical evidence.

There followed a colloquy between the District Attorney and appellant's counsel with reference to this motion. The District Attorney stated, inter alia, (1) the State did not intend to use as evidence any clothing which might have been taken from the deceased or the defendant; (2) no weapons were taken from defendant's person, home, vehicle, or from the scene of the crime; (3) no fingerprints were taken in the investigation of this case; (4) no blood samples were taken at the scene of the crime or from the defendant's person, home or vehicle; (5) there was nothing in the possession of the District Attorney or the Sheriff's Office or anywhere else even tending to show the innocence of the defendant, and (6) there was no search of the defendant's home, property or car, except there was a police pat down at the time of his arrest.

As to the motions of appellant requiring the State to produce copies of all reports; memoranda; written statements of witnesses; names, addresses, and telephone numbers of witnesses to be called by the State; statements of all persons in the memorandum, summaries of recordings of such statements of any person, made to any law enforcement officer or investigative staff of any prosecutor connected with the case; all memoranda, documents and reports to all law enforcement officers connected with the case; names and addresses of all persons having some knowledge or facts concerning the present case; the criminal records and any list or summary reflecting criminal records of all persons whom the State intends to call as witnesses against the defendant; all photographs, sketches and pictures which have been made by or shown to any witness or prospective witness in this case, and a detailed description of all physical items other than documents and pictures which the prosecutor anticipates using in the trial of the defendant and the exact place where and under whose custody such items are being held, the State objected to the disclosure of these items under authority of Sanders v. State, 278 Ala. 453, 179 So.2d 35; Thigpen v. State, 49 Ala.App. 211, 270 So.2d 666; Johnson v. State, Ala.Cr.App., 335 So.2d 663; Giddens v. State, Ala. Cr.App., 333 So.2d 615.

The trial court denied appellant's motions.

Next appellant took up his motion to quash the indictment on the ground that the statute under which the indictment was returned is unconstitutional. The trial court informed appellant's counsel that this Court had upheld the constitutionality of Alabama's new death penalty law and that it was bound by the decision of this Court, and, thereupon, denied the motion to quash the indictment. To this ruling of the court appellant reserved an exception.

Appellant then moved to his motion which he designated "Motion challenging 'death qualifications' voir dire questions." Appellant asserted that the use of death qualifications on voir dire violates the defendant's right to an impartial jury, drawn from a cross section of the community, and asked that the State be instructed not to raise that question. The trial court replied:

> "I can tell you now, Mr. Chestnut, if the State doesn't raise that question, the Court is going to raise it. I think the State is entitled to a fair cross section of the community, as well as the defendant, and I think that one of the qualifications for this jury is whether or not they meet what is the Witherspoon versus Illinois qualifications."

Appellant then moved to his motion to sequester the jurors during voir dire. This motion was denied.

Appellant next asked that the District Attorney be required to hand over all written or recorded statements made by the defendant which he had not given defense counsel. The District Attorney made known to the Court that he had given appellant's counsel the statement made by the defendant.

From the record:

"BY MR. CHESTNUT: Have you got anymore?

"BY MR. BRYAN: No.

"BY MR. CHESTNUT: Do you have any statements of any co-defendant?

"BY MR. BRYAN: There are no co-defendants that I am aware of.

"BY MR. CHESTNUT: Do you have any statement of anybody, written?

"BY MR. BRYAN: You mean witnesses?

"BY MR. CHESTNUT: Yes.

"BY MR. BRYAN: Of course.

"BY MR. CHESTNUT: We ask that he be required to hand those over.

"BY THE COURT: That motion is denied.

"BY MR. CHESTNUT: Do you have any statements, Mr. District Attorney, of any persons that would tend to show that the defendant was somewhere else?

"BY MR. BRYAN: No, sir.

"BY MR. CHESTNUT: Have you talked with anybody that gave an alibi for him?

"BY MR. BRYAN: No, sir.

"BY MR. CHESTNUT: Your Honor, we ask that the District Attorney be required to hand over to us the reports ---- the results of any scientific tests that he has, experiments made by the Toxicologist or anybody else, in connection with the defendant, which he intends to use in this trial?

"BY MR. BRYAN: We have the Toxicologist's report which Mr. Chestnut can get for a dollar and a half, under the State law, but I will be happy to give you a copy of it.

"BY MR. CHESTNUT: The defendant is indigent, and we ask that you give us a copy of that.

"BY MR. BRYAN: Here, the post-mortem examination.

"BY MR. CHESTNUT: Do you have any other statements?

"BY MR. BRYAN: No.

"BY MR. CHESTNUT: We would like for the prosecutor to be required to give us, Your Honor, if he has any, any records that he has kept, showing or tending to show how persons named on this venire have voted in past criminal or civil cases?

"BY THE COURT: Your motion is denied."

Finally appellant took up his motion to suppress the defendant's statement made to the investigating officers and testimony was taken on this motion. The first witness was Charlie Pouncey, the Sheriff of Butler County.

The Sheriff testified that he, Deputy Sheriff Danny Joe Duke, and the Chief of Police of the City of Greenville, Alabama, Raymond B. Moody, went to Montgomery, Alabama, where appellant was arrested pursuant to an arrest warrant. Two Montgomery County deputies and two Montgomery City detectives aided in making the arrest. Appellant was in an automobile driven by one Rufus Marsh. At the time of his arrest he

was given the Miranda rights and warnings and told the officers that he understood his rights. He was specifically informed of his right to counsel but never told the officers that he wanted a lawyer. He was transported from Montgomery to Greenville in an automobile occupied by the Sheriff, Deputy Sheriff, and the Greenville Chief of Police.

The Sheriff further testified that appellant was not threatened in any manner, nor were any promises made to him, and no inducements of any nature were made to him to get him to make a statement. He said appellant was not under the influence of alcohol or drugs and appeared to be normal in every respect. When they arrived in Greenville, appellant voluntarily showed the officers the route that he took after the robbery and when he was leaving the city. Appellant also pointed out people that he had seen and talked to on his route through the town. After the trip around Greenville, appellant was carried directly to the station house where he was again advised of his constitutional rights by the Chief of Police who then took a written statement from him which he signed in the presence of the Sheriff and the Chief of Police.

Chief of Police, Raymond B. Moody, testified that he took the signed statement from appellant on May 31, 1977 at 2:30 p.m. He stated that en route from Montgomery to Greenville appellant made an oral statement, after being warned of his rights, that he was sorry it all happened and that he felt bad about it. The written statement was not exactly the same as the oral statement because in the oral statement appellant told the officers that someone else was with him when he robbed the store. He later told the police officers he was alone when he committed the robbery.

Danny Joe Duke, Chief Deputy Sheriff of Butler ... testified that he was in the car that transported ... from Montgomery to Greenville. According to ... testimony there was very little conversation on the ... when appellant made the statement, ... he had done it," and that this statement was made just ... before they arrived in Greenville. Duke was not present ... the time appellant signed the written statement.

Appellant was then called as a witness on this ... to suppress his written and signed statement. In ... ry, appellant testified that he was 46 years of age ... finished the third grade; that he could read and write ... that he could not write very well without his glasses. ... mitted that the officers warned him of his rights on ... occasions and that he was specifically warned that he ... not have to make a statement and that he was entitled to ... sel. He also admitted that he signed a statement con- ... to the crime. He denied that he signed anything ... ving his rights but later stated that he was not sure ... ther he signed such a waiver of right.

At the conclusion of this hearing the trial court ... ied appellant's motion to suppress his confessory state- ... t.

On the record before us it is manifestly clear ... t the Jury Commission of Butler County went about the ... rformance of its duties in utmost good faith and exemplified ... conscientious devotion to duty in seeing that the jury box ... truly representative of the citizens of the county and ... t all segments of the population were not in disproportion ... the whole population. No person was discriminated against ... se of race, creed, color, national origin, sex, economic ... status or age.

The testimony of the Clerk of the Jury Commission [illegible] the jury commissioners demonstrates not only a lack of [illegible]ntional or purposeful exclusion of all qualified citi[illegible]s from jury duty but, on the contrary, shows a conscious [illegible] meritorious effort on their part to put the names of [illegible]lified persons on the jury roll and in the jury box, all [illegible] keeping with the mandate of the Federal Court Order to [illegible] and maintain at least thirty percent blacks in the jury [illegible].

Fairness in the selection of a jury does not require [illegible]ortional representation of races. The controlling rule [illegible] there must not be a systematic and purposeful exclusion [illegible] persons from jury duty because of race, and the same rule [illegible]es to women and all persons in the age group between [illegible]teen and sixty-five years.

In Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, [illegible]d.2d 759, the Court said:

> " * * * But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. (citing cases) Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. * * * "

In Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 [illegible]. 469, the Supreme Court ruled that it is the responsibility [illegible]t Court, under the Constitution, to redress "jury packing," [illegible] is a sinister species of art, but the Court would not [illegible]n good faith efforts to secure competent juries, merely [illegible] of varying racial proportions.

The burden of proving racial discrimination in the make[illegible] of a jury by systematic exclusion is on the defendant and [illegible] racial discrimination may not be assumed or merely asserted; [illegible]t be proven. Akins v. [illegible], 325 U.S. 398, 65 S.Ct. 1276;

[illegible] v. State, 36 Ala.App. 212, 70 So.2d 716 (reversed on other grounds); Swain v. Alabama, supra; Butler v. State, 285 Ala. 187, 232 So.2d 631.

We hold that no fraud was practiced by the Jury Commission in filling the jury box and there was no discrimination in compiling the master roll of qualified persons for jury in Lowndes County.

It will be noted that appellant was given a copy of his confession and a copy of the postmortem examination at the hearing on the motion to produce. He was entitled to the two documents but he was not entitled to have the State produce all the documents, items and other information listed on page 17 of this opinion under authority of the cases there cited. Hurst v. State, 34 Ala.App. 254, 307 So.2d 62, certiorari denied, 293 Ala. 266, 307 So.2d 73. Ex parte Jones v. State, 282 Ala. 397, 211 So.2d 877.

One other matter came to light during appellant's testimony during the voir dire hearing to determine the voluntary character of his confession. He testified that he was involved in an automobile accident in 1958 in which he sustained head injuries necessitating the placement of a metal plate in his head. This gave rise to a motion by his counsel for a continuance and to have a medical examination to determine his mental competency. Due to the clarity of appellant's testimony on voir dire the trial judge overruled this motion.

There was no error in overruling appellant's motion for continuance so that he could have a mental examination. No testimony was introduced tending to show that appellant had had any previous mental disorders or had been treated for any abnormal behavior. There was nothing before the court to compel the judge to the conclusion that he should have entertained a "bona fide doubt" or reasonable doubt as to the competency of appellant to stand trial. The cases of Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815, Hester v. State, 32 Ala.App. 432, 293 So.2d 483, have no bearing or to the facts in this case.

In [illegible] v. State, [illegible] 226 So.2d 645, the Supreme Court held:

> "the Legislature has not given a right to a defendant to receive a mental examination whenever he requests one. Absent such a right, machinery for screening requests must exist. The legislature has made the trial court this screening agent. We cannot say under our past cases that the appellant's showing was so compelling that the trial court abused its discretion in denying the petition."

There was no error in denying the motion of appellant's counsel to sequester the prospective jurors during the voir dire examination. This issue was put to rest by the Supreme Court in several cases. In Seals v. State, 282 Ala. 586, 213 So.2d 645, the Court said:

> "The Court did not err in overruling a motion of an attorney for the defendant below that he be permitted 'to examine each prospective juror outside the presence of the other jurors.' Jurors may be qualified on voir dire in groups at the discretion of the trial court."

To the same effect are the holdings in Beecher v. [illegible], 289 Ala. 1, 256 So.2d 154, and Johnson v. State, Ala. App., 335 So.2d 663.

We turn now to a consideration of the trial in chief. Prior to qualifying the jury appellant's counsel renewed his motion to have the Court appoint three reputable specialist practitioners in mental and nervous diseases to examine and determine the mental condition of the defendant and the existence of any mental disease or defect which would affect his present criminal responsibility or his criminal responsibility at the time of the commission of the crime. Counsel cited Sections 15-16-20, 21 and 22. He offered no testimony tending to show that appellant had suffered any mental disorders in his past history. He simply based his motion on appellant's testimony during the voir dire hearing concerning his confessory statement that he had brain surgery in 1958 following an automobile accident.

The Court replied:

> "Alright, let the record show that the defendant testified in his own behalf on the preliminary motions filed by him in this Court, along with other witnesses, that none of the other witnesses testified as to any unusual mental condition of the defendant. That the defendant himself testified, . . that the defendant, before he testified, asked the advice of his counsel before testifying, that the defendant testified in a clear and lucid manner, and the Court finds no reason from the record, to inquire further into his sanity, and your motion is denied."

Counsel for the defendant then stated, "Well, that includes any preliminary matters that we have, Your Honor."

Thereupon the Court proceeded to qualify the jury. Several jurors stated they were personally acquainted with the deceased and several more stated they had heard the victim was robbed and injured during the course of the robbery; that he was later carried to a hospital in Montgomery where he died. Defendant challenged these jurors on the ground they could not view and consider the evidence objectively.

The Court asked each of the jurors who answered knew the deceased, Mr. Zeigler, would the fact he personally knew the deceased in any way influence his verdict, and the jurors answered, "No, sir."

> "BY THE COURT:
>
> "Can you put aside the fact that you knew Mr. Zeigler, can you put aside the things you have heard, if you are selected as jurors to try this case, and try this case solely on the evidence as it comes to you from the witness stand?"

All such jurors answered, "Yes, sir."

> "BY THE COURT:
>
> "Can you give this defendant a fair and impartial trial with the knowledge you have of the facts, and the fact that you knew Mr. Zeigler?"

All such jurors answered, "Yes, sir."

The Court denied appellant's challenge as to all the jurors challenged in the light of their statements, under oath, that they could give the defendant a fair and impartial trial.

The jury panel examination continued and one juror, Mr. Jackson, stated that he was already 65 years of age and was retired. The State challenged this juror and the challenge was sustained.

Counsel for appellant asked Mr. Jackson to give his birth date and he said, "I don't know exactly." He was asked how he knew he was over 65 and he replied that his sister told him.

From the record:

"BY MR. CHESTNUT: Your Honor, I object to excusing Mr. Jackson, we don't know that he is over 65, he doesn't know how old he is.

"BY THE COURT: I believe the law says that the jury will be qualified on the oath of the jurors."

The Court overruled the objection and told Mr. Jackson to step aside.

The Court continued to qualify the jury and the following occurred:

"BY THE COURT: Are any of you related by blood or marriage to the alleged victim, Floyd M. Fielder?

"BY A JUROR: Yes, I am.

"BY THE COURT: What is your relationship?

"BY A JUROR: Cousin.

"BY THE COURT: What cousin is that?

"BY A JUROR: Distant cousins.

"BY THE COURT: Can't you give me any degree, or any better idea what the relationship was?

"BY A JUROR: Well, I don't know which cousin, I was a Harrison, and his mother was a Harrison.

"BY MR. CHESTNUT: We challenge her, Your Honor.

"BY THE COURT: Alright, you may step aside.

"BY MR. BRYAN: Your Honor, some argument that Mr. Chestnut gave, it hasn't been shown whether she is in the fifth degree of affinity, or in the ninth degree of consanguinity.

"BY THE COURT: You don't know what the relationship is.

"BY MR. TABOR: No, just distant cousins.

"BY THE COURT: Alright, your challenge is denied, Mr. Chestnut."

Under the provisions of Section 12-16-150, Code 1975, it is a good ground for challenge of a juror by either party:

"(4) That he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of the civil law, either with the defendant or with the prosecutor or the person alleged to be injured."

It is also good ground for challenge,

"(8) That he is under 19 or over 65 years of age."

We find no error in the action of the Court in excusing juror Jackson. Under oath he stated that he was already over 65 and had retired.

It is the policy of the law not to have persons over or under age on the jury. Such fact is a proper cause for excusing the juror. Nelson v. State, 215 Ala. 229, 110 So. 21; Slay v. State, Ala.Cr.App., 338 So.2d 3.

As to the juror who stated she was a distant cousin of the deceased without more does not tell this Court anything. Consanguinity, like affinity, must be determined according to the rules of civil law. Relationship within certain degrees, either of consanguinity or affinity, is an absolute disqualification. Brazleton v. State, 66 Ala. 96; Little v. State, Ala.Cr.App., 339 So.2d 1071.

It, therefore, becomes the duty of the trial judge to determine the precise degree of relationship of a juror to an injured party, whether by blood or marriage, when that issue is raised. See "The Nelson Chart of Relationship and Degrees of Kindred According to the Civil Law" on page 355 of the case of Owen v. State, 255 Ala. 354, 51 So.2d 541.

There was no error in sustaining the State's challenge to juror Jesse Godwin.

From the record:

"BY THE COURT: Alright, do any of you have a fixed opinion as to the imposition of the death penalty? If you do, raise your hands?

"BY A JUROR: Judge, my name is Jesse Godwin. I wouldn't vote the death penalty.

"BY THE COURT: Mr. Godwin, can you conceive of any circumstances or any sets of facts under which you would vote the death penalty?

"BY MR. GODWIN: Judge, I don't think so.

"BY THE COURT: Are you telling this Court that you are, irrevocably committed, before the trial of this case, to vote against it?

"BY MR. GODWIN: For conscience sake, yes.

"BY THE COURT: Regardless of what the facts are?

"BY MR. GODWIN: For conscience sake, yes.

"BY THE COURT: In other words, you would automatically vote against the imposition of the capital punishment, without regard for any evidence that might be developed in this case?

"BY MR. GODWIN: Yes, sir.

"BY THE COURT: If you were sitting as a Juror on the trial of this case, and you were convinced beyond a reasonable doubt and to a moral certainty that the individual was guilty, and that the supreme penalty, the death penalty should be enacted as punishment, and that the death penalty would be the proper punishment, do you have a fixed opinion against imposing the death penalty?

"BY MR. GODWIN: I don't believe that's within my jurisdiction to vote that.

"BY THE COURT: To answer my question, you say that you would not?

"BY MR. GODWIN: No, sir, I would not.

"BY MR. BRYAN: Your Honor, State of Alabama challenges for cause.

"BY THE COURT: Alright, you may step aside."

We conclude that the trial court was correct in sustaining the State's challenge to juror Godwin. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770; Seibold v. State, [illegible] Ala. 549, 293 So.2d 302; Bubbard v. State, 285 Ala. 212, [illegible] So.2d 86.

Around noon on April 28, 1977, Raymond B. Moody, Chief of Police of the City of Greenville, received a call to go to Zeigler's Hardware Store in that city. He found Mr. Zeigler on the floor close to the cash register in a semi-unconscious condition. He was bleeding profusely from the nose and mouth. The Rescue Squad arrived and carried Mr. Zeigler to a local hospital where he was given emergency treatment. He was transferred to a Montgomery hospital where he subsequently died.

Chief Moody further testified that a gun cabinet in the store had been broken into and there were some vacant spaces on the shelves where the victim kept his gun inventory. Photographs of the pistol cabinet were introduced into evidence as they clearly showed that the hasp had been broken or knocked off and several weapons were apparently missing. The pistols remaining in the cabinet were in a state of disarray.

An intensive investigation was immediately conducted in an effort to find the person or persons responsible for the robbery, the gun theft, and the murder of Mr. Zeigler. The investigation finally focused on appellant and he was arrested in Montgomery on May 31, 1977.

An autopsy was performed on the body of the victim by State Toxicologist G. R. McCahan, Jr. He gave a detailed history of his education, experience and qualifications in the field of toxicology and in conducting post-mortem examinations to determine the cause of death. His qualifications were not questioned by defense counsel.

The post mortem examination was made by Dr. McCahan on April 29, 1977, at the Dunklin Funeral Home in Greenville. He stated that he found eleven external wounds to the head of the deceased and these injuries were recent. There were numerous lacerations of varying lengths over most of the entire head, face, nose and neck.

In describing the internal injuries and the cause of death, he testified as follows:

"A. The first thing I did was make an incision from behind the ear to the other side of the ear, and reflect the scalp. That was, of course, after I had removed the sutures so that I could investigate the character of the wounds themselves --.

"Q. Would you please describe to me what the word reflect means?

"A. It means I pulled it frontwards and backwards so I could see the skull itself, the bony part of it. Alright, underneath the scalp and associated with these lacerations in the area that I had pulled the scalp back from itself, were areas of hemorrhage or bleeding and bruising. In other words, I found a large number of massive areas of hemorrhage, large areas of bleeding into the tissue right there (indicating), and a pooling of blood. In other words, it had collected in some of these areas throughout the scalp.

"The area then was looked at again, and in the right front of the skull itself, of the bony portion, there was a one and one-quarter inch in diameter, penetrating wound. In other words, it went through, into the brain proper. It's just a little bit right of the anterior midline, just a little bit right of it. And, there was some small fragments of bone still adhered to the edge of the hole itself, and they were semi-lunar in shape, or like a new moon, crescent in shape, and still partially attached. I noticed that there were fracture lines running both to the left and to the right of the hole that I have just described, with the majority of them taking in the area over the left eye. The bone by the area right here was broken (indicating).

"Then, looking further back on the scalp, underneath the scalp on the skull itself, the entire left side, and by that, I mean exactly that, the entire left side of it was just broken into numerous, fairly small pieces, anywhere from an inch on each edge, downwards. These were pieces of bone, and some of these pieces of bone had been driven into the brain on the left side, and some had been driven into the brain tissue underlying this on the right side. I removed the brain itself, and looked at the floor of the cranial vault, or, brain cavity, and in that area, I found that if you were to look down on it, straight back through the bottom was effectively split apart, and across to here (indicating) was also another line on the bottom of the floor where the brain lies, there was a fracture line there too. So, there were two fracture lines in the bottom of the cranial vault. In that area itself, as I noted, there were pieces of bone driven into the brain tissue. Also, there was a large amount of bleeding, which we call hemorrhage, and it had filled up any of the spaces that were

in there. I also checked the brain for any abnormal tissue of any different type, and found none. So, except for trauma involved in that area, I could find nothing that was grossly abnormal about the brain itself.

"Q. Alright. Doctor, have you reached a conclusion, based on all of your autopsies and all of your researc and all of your studies, have you reached a conclusion as to the cause of death in this case?

"A. Yes, I did.

"Q. Would you please tell the jury what that is?

"A. In my opin on, cause of death in this case was the result of multiple blows to the head, by a blunt instrument or blunt instruments of some sort."

Mr. Adolph Williams testified that he was employed by Mr. Zeigler to help in the store when he was needed. He stated a Mr. Tollie Shanks was also employed by Mr. Zeigler but in April of 1977 Mr. Shanks was ill and in the hospital and had been there for quite awhile. He further testified that on Wednesday, April 27, 1977, Mr. Zeigler went fishing and that he, Williams, opened the store that morning about 7:30 a.m. He stated that the stores in Greenville usually closed on Wednesdays at 12 o'clock and that he closed and locked the store on that date about 12 o'clock. He said there were two sets of keys to the store and he had one set and Mr. Zeigler had the other set. He stated that when he closed the store on April 27, 1977, there was between $150.00 and $200.00 in the cash register and he sold around $31.00 worth of merchandise that Wednesday morning.

Mr. Williams was shown State's Exhibit 18, marked for identification, and was asked if he recognized that exhibit. This exhibit was a ledger and Mr. Williams identified it as "a record of his guns that he sold." He further stated that this ledger was kept by Mr. Zeigler in the regular course of his business and that he had seen this same book numerous times during the time he worked in the store. This witness said the gun case or cabinet was

full of pistols on the Wednesday that he closed the store and the cabinet doors were locked. He stated that about four feet from the gun cabinet was a display area for wrenches, pliers and other hardware tools. The wrenches would weigh a pound or two. He further stated that he went by the store the next day about 8:30 a.m. for a few minutes and asked Mr. Miller about his fishing trip and then went on.

The State offered into evidence State's Exhibit No. 18, the ledger of the gun invoices that was kept in the regular course of business. Defense counsel objected on the ground the proper predicate had not been laid to introduce this book, saying, "Maybe I ought to ask him a few questions about it." He was allowed to do so.

In response to questions propounded by defense counsel Mr. Williams testified that the entries in the book were not in his handwriting but the handwriting was Mr. Miller's and that he imagined Mr. Shanks might have written in the book. He stated that he never sold a gun; that the book was a record that the federal law requires to be kept. When the book was not being used it stayed locked up in a safe in the store. The safe was open during business hours but was locked at night; that when a gun was sold the person selling the gun would go to the safe, get the book, write up the sale and return the book to the vault. At the conclusion of this testimony defense counsel stated, "Well, I don't have any objections to it going into evidence, Judge." The Court replied, "Alright, it will be received, and you may be excused."

The record reflects that, "the article hereinabove marked for identification as State's Exhibit 18 was received in evidence."

Linda Gail Lewis testified that on the day the victim was robbed she was sitting in a chair in her yard on Delesby Street in Greenville and appellant came up to her with a sack in his hand. She said he removed a radio from the sack and gave it to her, saying, "We are cousins," and he told her that he had a gun in the sack. She stated that she gave the radio back to appellant because he had gotten them into trouble before. She further testified that she had known appellant for about two years and they were not cousins; that on the date he tried to give her the radio appellant was dressed in a white coverall suit.

On cross-examination this witness testified that it was on September 3, 1977, that appellant tried to give her the radio and that the time was about 12 o'clock. On redirect examination she said it was on the day that the robbery occurred.

Voncile Taylor testified that she lived on South Park in Greenville and that on the day that Mr. Zeigler was robbed she saw appellant walking down World Street; that he was dressed in white coveralls; that she was walking about twenty feet behind him and the time was after lunch. She said that appellant had a brown paper bag in his hand and he dropped some guns on the street. She saw him stop and begin to pick up the guns and walk away but he left one gun where he dropped the bag. She picked up the gun and carried it to her home. She also picked up a firing pin at the same time she picked up the gun. She was shown State's Exhibit 19 and stated that it looked like the gun she picked up that her "old man", Charlie Cook, got the gun after she carried it to her home.

On cross-examination this witness testified that she knew appellant and her "old man" knew him. She stated she found the gun which was lying on the street; that appellant had left the gun and walked slowly away. She said she did not

tell her "old man" that she saw appellant drop the guns when she gave him the one she picked up, but that she did tell him later. She testified that her "old man" sold the pistol to Benny Betton but he did not tell her how much he got for the gun. She further stated that Sheriff Pouncey came to her later and got the firing pin; that she and her "old man" heard what happened to Mr. Zeigler but not before the gun was sold to Benny Betton. When she heard about Mr. Zeigler she became apprehensive because she did not know where the gun appellant dropped came from. She told the Sheriff that appellant was the person who dropped the gun that she picked up.

Charles Edward Cook testified for the State. According to his testimony, he was living with Voncile Taylor in April of 1977 when Mr. Zeigler was robbed. He was shown State's Exhibit 19 and identified it as a .38 caliber pistol; that he first saw the pistol at his house the night of the same day that Mr. Zeigler was robbed. He said he knew appellant and identified him in Court. He stated that he sold the pistol to Benny Betton for sixty dollars and a .32 caliber pistol.

On cross-examination Cook testified that he really did not personally know appellant but knew of him. He said that Voncile Taylor told him that appellant was coming down the street and dropped the gun and she picked it up. He stated that he didn't know anything to do with the gun but sold it. He said it was a day or two after he sold the gun that he heard about the robbery, and Benny Betton came and talked to him about the gun but did not offer the gun back to him. He was asked if he knew what happened to the gun and he pointed to it in Court and said, "There it is."

Benny Betton testified that he remembered when it was said that Mr. Zeigler was robbed and killed. He admitted buying a gun from Charles Cook and that it was a .38 Smith & Wesson. He was shown State's Exhibit 19 and said that was the gun he bought from Charles Cook and he bought the gun on the Saturday after the robbery. He stated that he traded the gun to Jeff Teitloff in Troy, Alabama.

Jeff Teitloff testified that he lived in Troy, Alabama, and owned Troy Paint and Body Shop. He said he remembered Benny Betton from a business deal he had with him the first part of the summer of 1977. He stated Betton came to his place and was interested in a Camaro car body and he had wanted to do some trading; that Betton came back three weeks later and they worked up a trade on a .38 Smith & Wesson pistol for the Camaro car body. He said he kept the gun around the shop as he sometimes worked late at night. One night two police officers came to his shop to see about him and they got to talking about guns. He knew one of the officers and offered to sell him the gun. The officer said he would mention it around the Police Department and around 9:30 the next morning the officers came to his house and told him the gun had been stolen in a murder-robbery in Greenville, Alabama. He gave the weapon to Detective McLendon of the Troy Police Department and also gave him a statement about his connection with the pistol. He identified the weapon as the same one that he traded to Betton and the same one he gave to Detective McLendon.

Detective James McLendon was called as a witness for the State. He testified that he knew Jeff Teitloff and first met him in May of 1977 when he gave him a revolver. He identified State's Exhibit 19 as the weapon he received from Teitloff and he gave the serial number on the gun - 2D20651. He stated that he turned the weapon over to Lieutenant W. C. Berry of the Greenville Police Department. He said he received the weapon from Jeff Teitloff on the 27th day of May, 1977.

This same weapon was traced from Lieutenant Berry to Chief Raymond B. Moody and from Chief Moody to Sheriff Charlie Muncey of Butler County. There was no unbroken link in the chain of possession of this weapon.

Ms. Brenda Franklin testified that she was employed by Hicks, Incorporated and had been so employed for fifteen years. Hicks was a wholesale sporting goods store. She said she was the Secretary and responsible for incoming and outgoing firearms and small arms ammo. She stated that Zeigler Hardware of Greenville, Alabama, was one of their accounts. She was shown State's Exhibit No. 20, marked for identification, and was asked if she could identify it. She said it was an invoice from Hicks, Incorporated, and bore her initials. She explained that her initials meant that this item was recorded in the Company's records, and was okayed by her to be shipped out. She stated that this invoice was kept in the regular course of business of Hicks, Incorporated, in Luverne, Alabama. She further testified that the invoice showed that Hicks, Incorporated, sold a Smith & Wesson pistol, number 20, two inch round, blue, serial number 2D20651, to Zeigler Hardware, Greenville, Alabama. The date of the sale was April 13, 1977.

Mr. Glenn B. Kibbler, a special agent with the Bureau of Alcohol, Tobacco and Firearms, a division of the United States Treasury Department, was called as a witness for the State. He testified that he knew Mr. Zeigler in his lifetime and that pursuant to his duties he had inspected the books and record of Zeigler Hardware Company over a period of years. He stated that in accordance with the Gun Control Act of 1968 Mr. Zeigler was required to keep a bound volume showing the acquisition and disposition of all firearms purchased and sold through his place of business. He was shown State's Exhibit 18, the ledger or book that Mr. Williams testified was kept by Mr. Zeigler in the usual course of his business, and stated that he was familiar with this book and the manner in which Mr. Zeigler kept his gun records as required by federal law.

he had examined this book since 1968 when the law came into effect. He was asked to examine the book to see if there was an entry for a pistol with the serial number 2D20651 (State's Exhibit 1[illegible], which was the pistol that Voncile Taylor saw appellant drop on the street and she picked up) and Mr. Kibbler replied, "Yes, I find that weapon here." He further testified that this particular weapon was purchased from Hicks, Incorporated, Luverne, Alabama, a holder of a federal firearms license. He stated the acquisition portion of the book was filled in for this weapon but the disposition part of the book was left blank, indicating this weapon was not sold. He further said that the book dating back from 1968 contained disposition entries on the firearms which he sold, and that he had never found any discrepancies in Mr. Keigler's book.

Mr. Kibbler was asked to explain the different columns in State's Exhibit 18 and he stated the first column showed the name of the manufacturer of the firearms. He said one side of the book is the acquisition portion of the record, "as the gun is acquired by the federal licensed dealer, he is required by law to enter that gun into his bound book the day it comes into his shop. Then, he would fill out the other side of the page, which is the disposition portion of the book, on the day that the firearm leaves his shop."

This witness was asked to examine the book to see if there was an entry for the following firearms: 357 Highway Patrol model, serial number N-269890; .32 caliber weapon, serial number 897197; .22 caliber weapon, serial number T-500687; a .T .380 caliber, serial number 04468; and a pistol with serial number 2D20651. Mr. Kibbler replied that all of these weapons were listed in the book but they were not listed in the disposition part of the book which indicated they had not been sold. This testimony was admitted into evidence over the objections of appellant.

At the conclusion of this witness's testimony, appellant's counsel made the following motion:

> "Your Honor, we move to strike this witness's testimony and we also move for a mistrial on the grounds that the witness has been brought in as an expert of sorts from the federal government, and instead of testifying from a document, saying that the document indicated, that no disposition was made on some particular weapon, the witness has gone forward to state his conclusion that such and such a weapon was not in fact sold, and that is beyond the purview of this witness, and it's critical in this case. We cannot recover from it, and we move for a mistrial."

The motion was denied, and we think rightly so. We have examined Exhibit 18 and find that it consisted of thirty-four double page sheets with ten column headings reflecting the names of the gun manufacturers; make or model, the serial numbers of each weapon; the type of action of each gun; the caliber or gauge; the purchase date; the names of the vendors; the names and addresses of the persons to whom the weapons were sold; and the dates they were sold. These entries were recorded over a ten or eleven year period and reflect an inventory of approximately twelve hundred firearms. In addition the book shows that approximately one hundred and fifty guns were not listed in the disposition column.

State's Exhibit 18 was properly admitted into evidence as a record made in the regular course of business pursuant to the provisions of Section 12-21-43, Code of 1975.

There was no error in permitting witness Kibbler, who was thoroughly familiar with the book in which the deceased recorded his gun transactions, to give a shorthand rendition of the facts relating to the contents of State's Exhibit 18 and the missing guns.

In this State the rule is stated to be: "In the cases where it is impracticable or impossible for the Court (jury) to make an examination of a large number of instruments, entries, or records, a competent witness may make such examination and present his conclusions thereon to the Court (jury)."

Gov. Camp, W.O.W., v. Hoomes, 219 Ala. 560, 122 So. 686, 692; Kersh v. State, 26 Ala.App. 1>, 153 So. 284. See Gamble, McElroy's Alabama Evidence, Third Edition, Sections 220.01, 220.02.

The reason for the rule is that any other course would cause great loss of time and tend to confuse the jury. To have refused the testimony of Kibbler would have thrust upon the jury an unduly arduous and time-consuming task. It is very doubtful that the jury could have examined the gun book and found the missing weapons as testified by Kibbler.

Katy Harris Chambers testified for the State. According to her testimony appellant, on the day of the robbery, came to her mother's home in Honoraville, Crenshaw County, and asked her to drive him to the home of one Rufus Marsh. She told him she didn't have a car and he would have to ask her mother. The mother agreed to carry him to Marsh's house and appellant gave Chambers two weapons as compensation for the trip. One was a .32 caliber pistol and the other was a .22 caliber pistol. She gave her mother the .22 caliber weapon and kept the .32. Subsequently, these two guns were given to the Sheriff of Butler County. During the trial this witness was shown the two guns and stated they looked like the guns that appellant gave her on the day that Mr. Zeigler was robbed. She further stated that at the time appellant gave her the guns she had not heard about the robbery.

Sheriff Charlie Pouncey was recalled as a witness and verified that the two pistols, Exhibits 21 and 22, were turned over to him by Callie Mack, the mother of Katty Harris Chambers. He testified these two weapons had been in his exclusive possession since he received them from Callie Mack.

Rufus Marsh testified that he lived at Honoraville, Crenshaw County, and had known appellant for thirty years and pointed to him in the courtroom. He said he recalled the occasion in April, 1977, when Mr. Zeigler was alleged to have been robbed and killed and that on the afternoon of that date appellant came to his home and asked him to take him to Montgomery; that when appellant arrived he was wearing white coveralls and was carrying a brown paper bag. He further stated that appellant gave him four dollars and a pistol to take him to Montgomery. He was shown State's Exhibit No. 23 and identified it as the pistol appellant gave him. He said about a month later he gave the gun to Sheriff Casey and this was verified by the Sheriff on recall as a State witness. State's Exhibit 23 was offered and received in evidence without objection.

The State presented several other witnesses who testified seeing appellant on the streets of Greenville the day Mr. Zeigler was robbed.

Mr. Jim Denson testified that he was employed by Teague Hardware Company in Montgomery, Alabama, as a purchasing agent, and he was responsible for logging into the records of the company all the pistols which the Company bought and sold. He identified State's Exhibit No. 25 as a bill of sale made to Zeigler Hardware Company in Greenville. This document showed that Teague Hardware sold a model 28 pistol to Zeigler Hardware Company and the serial number was N-269890. This pistol was listed in Mr. Zeigler's gun book as having been received but it did not appear in the disposition column as having been sold according to the testimony of Mr. Kibbler. The bill of sale was introduced into evidence without objection.

Chief of Police Raymond Moody was recalled as a witness for the State and testified that on April 28, 1977, he went to Zeigler's Hardware Store in Greenville. He inspected the cash register and found approximately seventeen dollars in change, but no currency.

He further testified that he and several other officers arrested appellant in Montgomery on May 31, 1977, pursuant to an arrest warrant, and he advised him of the Miranda rights and warnings at the time he was arrested. At this point a hearing was held outside the presence and hearing of the jury.

At the hearing Chief Moody stated that he, and no one in his presence, applied any violence to the defendant; that no promises or threats were made to him; that no inducements of any kind were made to him to get him to make a statement; that he was not promised any immunity. He was asked what he advised the defendant and he replied:

> "That he may remain silent, and does not have to make any statement at all. That any statement that he might make may be used against him in Court, and that he had the right to consult with an attorney before making a statement, and to have such attorney present while making a statement. And if he did not have enough money to employ such attorney, that he would have the right to have one appointed and to consult with the attorney and to have him present while making a statement and if he did make a statement, that no questions would be asked of him until the attorney was present with him to represent him."

Chief Moody further stated that the defendant said he understood his rights and voluntarily signed a waiver of rights form by making a mark (x) thereon in his presence and in the presence of the Sheriff of Butler County, both of whom signed as witnesses. After signing the waiver of rights form, appellant made a statement which was written by Chief Moody. After the written statement was taken it was read to appellant and he put his mark (x) on each page of the four-page statement.

On cross-examination Chief Moody was asked, "What specifically did the defendant say to indicate to you that he understood the statement that he signed?" The Chief replied, "He said he just felt bad about the whole thing, and he would like to talk about it."

At the conclusion of Chief Moody's testimony the trial court ruled that appellant's confession was knowingly, understandably, and voluntarily made. The State laid the proper predicate for admission of appellant's confessory statement. The statement is as follows:

"On Thursday morning, April 28, 1977, at approximately 11:30 A.M., I was wearing a pair of white prison clothes and went into Zeigler Hardware Store on Commerce Street.

"I was over behind the counter trying to steal a knife, another guy was with me talking to the man.

"After the man caught me, he grabbed me and hit me and I grabbed a piece of iron, like a tire tool, and hit him with it twice. I was trying to get loose from him and the other guy pushed him.

"The other guy opened the gun case and we got two paper bags and got some guns. Six or seven pistols. The other guy got some in a sack.

"Mr. Zeigler was lying in the floor telling us to get out.

"I left, but the other guy stayed. I left and went toward the courthouse on Commerce and stopped at the 76 Station across from City Hall. I went to the mens restroom and took the money out of the billfold, thirty-six dollars, and put it in the trashcan in the restroom.

"I left the 76 and walked to Grayson's Store at Court Square. I went south on Conecuh Street to Parmer Street, turned right and walked west to Oglesby Street. Turned north on Oglesby Street and walked to a yard by Max's Sandwich Shop. I talked to a lady and a girl. I still had my sack of six or seven pistols with me. I left there south on Oglesby and had a drink with a man on his porch in front of Lee Albert Crittenden's Barber Shop.

"I then continued south on Oglesby Street and took a left on World Street. Walked on World Street east to South Park Street and dropped a pistol and picked it up and put it back in my sack. I then kept going east to Dollar Bill's house. I set the sack on the porch and talked to Will Murphy (Dollar Bill) and asked about my uncle Lewis Hawkins. Dollar Bill told me where he lived and I walked through a path to my uncles and he wasn't home. I walked east on Perdue to Mr. Allen's house and he carried me out to the country. We stopped by Robert Mack's house. He wasn't at home. I then went to Joe and Callie Mack's house in Honoraville, Alabama. I left two pistols with them and stayed around until late that afternoon.

"We drank some whiskey and he carried me to Rufus Marsh's house and he carried me to Montgomery. I gave him one pistol for carrying me to Montgomery. He carried me to South Holt Street, John T. Montgomery and Ned Reese were with him. I walked to my house 355 Wayne Street. I had sold or gave away all the guns.

"This is a true statement to the best of my knowledge and consists of four pages.

"I have not been promised a reward or hope of reward.

I make this statement because I am sorry about killing the man and want to tell the truth.

"This statement can be used in Court.

"Statement made in the presence of Sheriff Pouncey, John Andrews, Danny Duke and R. D. Moody and his mark.

"Q. What time was this taken, please?

"A 2:30 P.M. on May 31st."

During this same interrogation, and after appellant was again advised of his constitutional rights, he made and signed two other statements in connection with the robbery of Mr. Zeigler. These statements are as follows:

"2:25 P.M. May 31st, 1977.

"Question, did you hit Mr. Zeigler with a piece of iron in the head several times when you were in his hardware store two days after you got out of the county jail?

"Answer, yes, that's right.

"Question, how did you get the billfold?

"Answer, after I knocked him down, I reached in his pocket and got it.

"Question, tell me about each gun?

"Answer, number one, first two Callie Mack got.

"Number two, Rufus Marsh got one for carrying me to Montgomery.

"Number three, John T. Montgomery sold three of them out of the bag while we were in the car.

"Number four, I sold one in Montgomery for ten dollars to a black dude. This was down below my house on Wayne Street about three weeks ago.

"Question, were you alone when you went into the hardware store?

"Answer, no, sir, there was a black male with me. Taller than I am, had a beard. Real black, from Fort Deposit.

"Question, whose idea was it to go in the hardware store?

"Answer, he told me (the black man) that we should go in and steal a gun to get some money.

"This statement consists of two pages.

"This is a true statement to the best of my knowledge.

"I have not been promised a reward or hope of reward to make this statement.

"This statement can be used in a Court of law.

"Made in the presence of Sheriff Pouncey, Danny Duke, John Andrews, R. D. Moody, his mark was put at the bottom of the page and on the first page also."

"Willie Lewis Mack, May 31st, 1977 at 3:10 P.M.

"Question, did you just make up the story about the other man and you did it alone?

"Answer, yes, sir. I just made him up. He was not with me. I was alone.

"This is a true statement and I made it of my own free will. No reward or promise of reward was made for me to change it.

"I now have told the truth.

"One page statement made in the presence of Sheriff Pouncey, John Andrews, Danny Duke, R. D. Moody and Willie L. Mack put his mark on it."

Before these statements were actually read to the jury appellant's counsel made a motion to permit the defendant to take the witness stand for the limited purpose of testifying concerning the voluntariness of his confession. The trial court denied this motion and held that once a defendant waives his right to remain silent he waives it for all purposes, "on any and all matters concerning the case." Appellant then declined to take the witness stand and subject himself to cross-examination on any question material to his guilt or innocence.

At the suppression hearing the defendant testified to the circumstances surrounding the giving of the confessory statements. Cross-examination was limited to the issue of voluntariness alone.

It is settled law in this State that an accused who elects to testify in his own behalf waives his right not to be compelled to give incriminating testimony and may be cross-examined to that end. Smith v. State, 247 Ala. 354, 24 So.2d 546; Coggs v. State, 253 Ala. 290, 45 So.2d 35; Pruitt v. State, 232 Ala. 421, 168 So. 149; Gast v. State, 237 Ala. 307, 186 So. 554; Boulden v. State, 278 Ala. 437, 179 So.2d 27.

Finally appellant contends that Act 213, 1975 Ala. Acts, page 701 et seq., now Sections 13-11-2, et seq., Ala. Code 1975, is unconstitutional. The constitutionality of this Act is no longer an open question in this State. On May 19, 1978, the Supreme Court of Alabama, in Ex parte: Jerry Wayne Jacobs, S.C. 2808 (In re: Jerry Wayne Jacobs v. State of Alabama), affirmed this Court's opinion in upholding the conviction of murder in the first degree, including the sentence of death, and holding the Act constitutional.

Section 13-11-4, Ala. Code 1975 provides, in pertinent part, as follows:

> "If the Court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:
>
> "(1) One or more of the aggravating circumstances enumerated in Section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and
>
> "(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances."

Chief Justice Torbert in his concurring opinion in the Jacobs case, supra, said:

> "The Court of Criminal Appeals and this Court, by statute (Section 12-22-150, Code of Alabama 1975) and by Court rule (amended Rule 39 (c), Ala. R. App. P.) respectively, must review the decision of the trial court where the death penalty is imposed. This mandatory review guarantees that, before a defendant can be executed in Alabama, the sentence of death must be found appropriate by both the Court of Criminal Appeals and this Court after a review of the aggravating and mitigating circumstances found in the case by the trial judge.

> "However, this appellate review safeguard - - a substantial protection for the defendant in Alabama - - is nonexistent unless the trial judge conducts a full and fair sentencing hearing and enters complete written findings as to aggravating and mitigating circumstances. *** " (Emphasis supplied)

The trial court set a sentencing hearing but he did not enter "complete written findings as to aggravating and mitigating circumstances."

The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the crime and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done "the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision."

Prior to the date set for the hearing the trial court shall order a pre-sentence report and furnish the defendant and his attorney with a copy of same. The defendant must be afforded the opportunity to adduce any testimony which has a probative value that will enable the court to perform its constitutional responsibility for the question of whether a man should live or die is not to be treated as a mere formality.

The trial court is further directed to call before him the juror who on voir dire stated she was a "distant cousin" to the deceased and determine the precise and exact degree of kinship in accordance with the rules of the civil law.

Accordingly, this case is remanded to the Circuit Court of Butler County to make and enter a full and complete written finding as to the aggravating and mitigating circumstances after the hearing is conducted with the defendant and his attorneys present.

The trial court is further directed that a full record be made of this hearing, which should be conducted expeditiously, and a transcript of these proceedings under the Seal of the Circuit Court promptly forwarded to this Court. See Seibold v. State, 383 Ala. 543, 251 So.2d 302.

Remanded for further proceedings in accordance with this opinion.

All the Judges concur.

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After Remandment

This case was remanded to the trial court to hold another sentencing hearing and to enter "complete written findings as to the aggravating and mitigating circumstances" based upon the trial evidence. The trial court was further ordered to secure a presentence report prior to said hearing and furnish the defendant and his attorney with a copy of same, and to afford the defendant the opportunity to adduce testimony which would have any probative value to enable the Court to perform its constitutional responsibility in determining whether the defendant would be sentenced to death or to life imprisonment without parole. The Court was further directed to call before him the juror who on voir dire stated she was a "distant cousin" of the deceased and determine the precise and exact degree of kinship in accordance with the rules of civil law.

In strict compliance with our order of remand the trial court held another hearing with the defendant and his attorney present. At the conclusion of the hearing the Court made and entered the following written findings:

> "This cause was set for hearing pursuant to the opinion of the Alabama Court of Criminal Appeals which ordered this Court to order a pre-sentence report prior to the said hearing and furnish the defendant and his attorney with a copy of the same, and to afford the defendant the opportunity to adduce testimony which would have any probative value and would enable the Court to perform its constitutional responsibility for the question of whether a man should live or die. The Court was also directed to call before it the juror who on voir dire stated she was a 'distant cousin' of the deceased and determine the precise and exact degree of kinship in accordance with the rules of civil law.
>
> "The pre-sentence report was ordered by the Court and furnished to the defendant and his attorney and has been considered by the Court.

"The defendant offered no new evidence at the hearing but relied upon the question raised during the trial concerning the defendant's head injury, and the defendant's financial inability to secure medical testimony concerning said injury.

"Upon consideration of the pre-sentence report, the evidence of the crime itself and the defendant's contention concerning his head injury, the Court finds the following aggravating circumstances:

"The defendant has an extremely long prior criminal record including sentences to the penitentiary in the State of New York and the State of Alabama.

"The Court further finds that in the course of the robbery the deceased was cruelly and brutally beaten with a blunt instrument about the head and left in his shop. That in the course of the robbery several weapons were taken by the defendant along with some money from the person of the deceased, and from the store.

"The only mitigating circumstance the Court finds has to do with the defendant's unsubstantiated contentions concerning his head injury. The Court notes that at a suppression hearing the defendant testified to the circumstances surrounding the confessory statements. That the defendant's statements were clear and lucid and he gave no evidence of any mental abnormality. The defendant has a significant history of prior criminal activity. There is no evidence that the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. The victim of the crime was not a participant in the defendant's conduct, nor did he consent to the act. There is no evidence that the defendant was an accomplice in the commission of this crime. There is no evidence that the defendant acted under extreme duress or under the substantial domination of another person. There is no evidence that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. That at the time of the commission of the offense the defendant was only 47 years of age.

"The Court therefore finds that there were no substantial mitigating circumstances in connection with this offense and that the aggravating circumstances far outweigh any mitigating circumstances and that the death sentence was warranted under all of the surrounding circumstances.

"The Court also called before it the juror, Myrtice Porterfield, who testified on voir dire that she was a 'distant cousin' of the deceased. Upon further examination of said juror she testified that she was a fourth cousin of the deceased on one side of the family and a fifth cousin of the deceased on the other side of her family. The law provides for proving of grounds for challenge for this cause by oath of the juror. The Court therefore concludes that the juror was not related to the deceased within the prohibited degree and that the challenge was due to be denied.

"It is therefore ORDERED and ADJUDGED by the Court that the challenge of the juror, Myrtice Porterfield, be and the same is hereby denied.

"It is further ORDERED by the Court that the sentence of death previously ordered by the Court be and the same is hereby sustained.

"It is further ORDERED by the Court that the Clerk and the Court Reporter prepare a transcript of this said hearing and forward the same to the Alabama Court of Criminal Appeals.

"It is further ORDERED by the Court that a copy of this Order be furnished by the Clerk to the defendant and his attorney.

"DONE this 28th day of December, 1978.

/s/ Arthur E. Gamble, Jr.
CIRCUIT JUDGE"

The presentence report was furnished the defendant and his attorney and was introduced into evidence at the hearing. This report reveals that the defendant served time in the penitentiary in Alabama for burglary and grand larceny. He was convicted in the State of New York of burglary and petty larceny; grand larceny; burglary in the third degree and grand larceny; grand larceny of an automobile; burglary in the third degree, and the possession of dangerous drugs. For the New York convictions he served time in several prisons including Sing Sing. In addition to the above felonies he has run afoul of the law in misdemeanor cases both in Alabama and New York beginning in the year 1953.

We are in full accord with the findings of the trial court and find that they are fully supported by the evidence in this case.

The judgment of conviction is, in all things, affirmed.

AFFIRMED.

All the Judges concur, except Bookout, J., who dissents with opinion.

BOOKOUT, J., dissenting:

I am unable to concur in the affirmance of the death penalty based upon the written findings of the trial court furnished this court after remandment. I would again remand to the trial court for additional findings or clarification of the finding dated December 28, 1978, supra.

Concerning the trial court's findings as to aggravating circumstances, I am of the opinion that they fail to meet the strict mandate of the statute which is required in the enforcement of all criminal laws. Finding that the defendant "has an extremely long prior criminal record including sentences to the penitentiary" in Alabama and New York does not comply with § 13-11-6(2), Code of Ala. 1975, which requires a finding that the appellant "was previously convicted of another capital felony or a felony involving the use or threat of violence to the person."

The majority opinion states the presentence report reveals that the appellant had served several sentences for burglary, grand larceny, petit larceny, larceny of an automobile, third degree burglary, and possession of "dangerous drugs," (which was listed as a misdemeanor in that report). The majority further points out that the appellant had served time in Sing Sing Penitentiary. Nowhere does the trial judge's findings, nor those of this court, reveal a prior conviction of another capital felony, or a felony involving the use or threat of violence to the person. The statute does not allow a crime against property by stealth to be set out as an aggravating circumstance. Neither does it enumerate as an aggravating circumstance that a defendant served time in a number of penitentiaries, even an infamous one. Likewise, the fact that during the robbery "several weapons" were taken along with "some money" is not an aggravating circumstance listed in the statute.

The finding of the trial court closest to that described in the statute concerns the cruelty of the offense. Section 13-11-6(8) requires a finding that the crime was "especially heinous, atrocious, or cruel." (Emphasis supplied.) The trial court found that during the course of the robbery, "the deceased was cruelly and brutally beaten with a blunt instrument about the head and left in his shop." It is my opinion that the trial court's findings should be in conformity with the strict wording of § 13-11-6(8), supra. Particular attention should be paid to the fact that the legislature, in reinstituting the death penalty, intended that it be exercised in cases which were "especially heinous, atrocious, or cruel." I believe it is imperative that the findings of trial judges in death penalty cases adhere closely to the strict wording of the statute, otherwise there will be a tendency to gradually expand the scope of the statute thereby endangering the constitutionality of its application. I therefore would remand for additional findings by the trial court.

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-5835

WILLIE LEWIS MACK,

Petitioner

v.

STATE OF ALABAMA, Respondent

BRIEF IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

Comes now the State of Alabama by and through its Attorney General and respectfully asserts that the Petition for Writ of Certiorari is due to be dismissed and that this matter should not be reviewed by this Honorable Court.

STATEMENT OF THE CASE

This case arose from the Circuit Court of Butler County, Alabama after the Petitioner was convicted therein for the offense of "robbery or attempts thereof when the victim is intentionally killed" (Code of Alabama, 1975, Sec. 13-11-2(a)(2). The punishment was set at death.

The appeal of the conviction resulted in affirmance by the Alabama Court of Criminal Appeals after remandment on February 26, 1979. Application for rehearing was denied. The

Alabama Supreme Court granted the Certiorari Petition and heard oral arguments. The case was affirmed on August 24, 1979. Rehearing was denied.

The Petitioner filed a motion to stay execution which was granted by Mr. Justice Powell, Jr. on December 27, 1979.

Thereafter a Petition was filed with this Honorable Court to which this brief is in opposition.

REASONS FOR DENYING WRIT

The Petitioner raises seven basic issues on this attack of the Constitutionality of Alabama's death statute. Those of significance to this Petition are discussed below.

(I) Petitioner contends that Alabama's death penalty statute is unconstitutional because it precludes the trial jury from considering lesser included offenses. On October 9, 1979, this Honorable Court granted certiorari in Gilbert Franklin Beck v. State of Alabama, (United States Supreme Court No. 78-6621). The order granting certiorari read:

> "The petition for a writ of certiorari is granted limited to the question presented by the Court: May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?"

The Beck case has been briefed, and submitted to the Court.

The position of the State of Alabama, and of the respondent in this appeal, concerning the preclusion of lesser included offenses is twofold. First, preclusion of a lesser included non-capital offense in a capital case is not unconstitutional even if the evidence at the trial of the case would support a

conviction for the lesser included non-capital offense. Second, even if it is unconstitutional to preclude a lesser included non-capital offense in a capital case in which there is a factual basis in the evidence for a conviction for that lesser offense, it is not unconstitutional to preclude a conviction for a lesser included offense when no evidence is presented at the trial of the capital case which would support a conviction for the lesser offense instead of for the capital offense.

The first issue described above will be decided by this Honorable Court in Beck v. Alabama, supra. If the Supreme Court decides that issue in favor of the State of Alabama, then the remaining issue described above need not be decided. If the Supreme Court decides the Beck case adversely to the State of Alabama, then the remaining issue will be presented in this case or other Alabama death penalty cases presently before this Court.

(II) The Rule in Non-Capital Cases is That a Jury is Permitted to Consider Lesser Included Offenses Only if There is a Factual Basis in the Evidence for Them

(A) The Federal Rule

As the United States Supreme Court held in Sansome v. United States, 380 U.S. 343, 350 (1965), "A lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser included offense." Accord, e.g., United States v. Madden, 525 F.2d 972, 973 (5th Cir. 1976); United States v. Flint, 534 F.2d 58, 60 (5th Cir.), cert. denied, 429 U.S. 924 (1976). It is neither necessary nor proper to permit a jury to consider convicting a defendant for a lesser offense unless the jury could rationally find that although all the elements of the higher offense had not been

proven all of the elements of the lesser offense had been. E.G., Sansome v. United States, 380 U.S. at 351; Methvin v. United States, 441 F.2d 584, 586 (5th Cir. 1971). The case of Keeble v. United States, 412 U.S. 205 (1973), is not to the contrary, because in that case the defendant's intent to create serious bodily harm was "very much in dispute at trial." 412 U.S. at 213. Since that intent was an element of the higher offense but not of the lesser offense, the Court specifically found that the jury "could rationally" have convicted the defendant of the lesser offense instead of the greater one. 412 U.S. at 213. Absent a factual dispute over the existence of an element necessary only to the higher offense, the result is to the contrary. As the Court said in Sansome v. United States, 380 U.S. at 334-335:

> In sum, it is clear that there were no disputed issues of fact which will justify instructing the jury that it could find that petitioner had committed all the elements of either or both of the (lesser offenses) without having committed a violation of the (higher offense). This being the case, the petitioner was not entitled to a lesser included offense charge . . .

The rule described is the rule which prevails in the federal courts, but the same rule generally applies in Alabama courts.

(B) The Rule in Alabama

> On p. 8 of petitioner's petition, he states that:
>
> As a general principle, Alabama permits a jury to find a criminal defendant guilty of any lesser degree of, or any offense necessarily included in, the crime with which he is charged. Alabama Code, Sec. 15-7-1 (1975).

That is not correct. Under Alabama law, the general rule is that a defendant is not entitled to have the jury consider a lesser included offense unless under a reasonable theory based

upon the evidence the defendant could be guilty of the lesser offense instead of the greater one. E.g., Fulgham v. State, 291 Ala. 71, 277 So.2d 886, 890 (1973) (upholding refusal to instruct on manslaughter in the second degree in a murder case); Kelly v. State, 235 Ala. 5, 1976 So. 807, 808 (1937) (upholding refusal to instruct on larceny and assault and battery in a robbery case); Whitehead v. State, 206 Ala. 288, 90 So. 351, 354 (1921) (upholding refusal to instruct on manslaughter in the first degree in a murder case); Golston v. State, 57 Ala. App. 623, 330 So.2d 446, 449-450 (1975) (upholding refusal to instruct on attempted robbery in a robbery case); Harvest v. State, 342 So.2d 1369, 1372 (Ala. Cr. App. 1977) (upholding refusal to instruct on petty larceny in a grand larceny case); Harris v. State, 44 Ala. App. 654, 219 So.2d 410, 413 (1969) (upholding refusal to instruct on grand larceny in a robbery case); Bowman v. State, 44 Ala. App. 331, 208 So.2d 241, 244-245 (1968) (upholding refusal to instruct on lesser included offenses in a robbery case). These cases also establish that where evidence

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Footnote 10 on p. 8 of petitioner's brief implies that Warren v. State, 197 Ala. 313, 319, 72 So. 624 (1916), held that a jury must always be permitted the option of convicting a murder defendant of manslaughter regardless of whether that lesser included offense is supported by the evidence. As Fulgham v. State, supra, and Whitehead v. State, supra, establish, the law in Alabama is that it is not proper to charge a jury in a murder case on manslaughter unless there is an evidentiary basis for such a charge. Indeed, Warren v. State, supra, itself so holds. The portion of that decision which petitioner cites, 197 Ala. at 319, 72 So. at 626, is from the opinion of Justice Mayfield who dissented. As the last part of the decision indicated, 197 Ala. at 348-349, 72 So. at 638, the majority differed from Justice Mayfield and affirmed the trial court's refusal to charge the jury on manslaughter because there was no evidentiary basis for that lesser included offense.

is undisputed, there can be no evidentiary basis for permitting the jury to consider any lesser included offenses. See, e.g., Harris v. State, 219 So.2d at 413; Golston v. State, supra. [1]

There is one and only one exception to the rule in Alabama that lesser included offenses are to be submitted to the jury only if there is an evidentiary basis to support them. That exception is contained in Code of Alabama 1975, Sec. 13-1-73 which provides that when a jury convicts a defendant under an indictment for murder in the first degree, the jury must be permitted to determine whether the defendant is guilty of murder in the first or second degree. This special statutory rule, which is an exception to the general rule, means that at the trial of a first degree murder indictment the jury must be instructed on and permitted to convict for second degree murder regardless of whether there is a factual basis in the evidence for that lesser included offense.[2] This special statutory rule applies only to murder indictments and not to capital indictments generally. For example, before Furman v. Georgia, 408 U.S. 238 (1972), robbery was a capital crime in Alabama, Title 14, Sec. 415, Code of Alabama 1940 (Recompiled 1958), yet the Alabama courts repeatedly held that it was not proper to permit a jury to consider lesser included offenses in a robbery case unless

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[1] This case law has been codified in Code of Alabama 1975, Sec.13A-1-9(b) (1979 Supp.), which provides that, "The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." Section 13A-1-9(b) is part of the new Alabama Criminal Code, adopted in 1977, but applicable only to crimes committed on or after January 1, 1980.

[2] Effective January 1, 1980, section 13-1-73 is repealed and replaced by section 13A-1-9(b) of the new Alabama Criminal Code.

there was some evidentiary basis for convicting on them instead of on robbery itself. E.g., Kelly v. State, 235 Ala. 5, 176 So. 807, 808 (1937); Bowman v. State, 44 Ala. App. 331, 208 So.2d 241, 244-245 (1968).

Even if the last clause in Code of Alabama 1975, Sec. 13-11-2(a), which precludes lesser included offenses in capital cases were to be held unconstitutional and severed from the statute, there would still be no state law requirement that the jury in a capital case be permitted to consider lesser included offenses for which there is no basis in the evidence. Section 13-1-73 would not apply, because that statutory provision is limited by its terms to murder indictments. The Alabama Supreme Court has repeatedly held that the capital felonies which are listed in Code of Alabama 1975, Sec. 13-11-2(a) are not crimes of murder and cannot be described or referred to as murder, or capital murder, or even murder under aggravated circumstances. E.g., Clements v. State, 370 So.2d 723 (Ala. 1979); Watters v. State, 369 So.2d 1262 (Ala. 1978); Jacobs (John L.) v. State, 371 So.2d 448 (Ala. 1978). Therefore, it follows that if the preclusion of lesser included offenses clause contained in Alabama's capital punishment statute is held to be unconstitutional and is severed from the statute, then the law in Alabama will be that a jury in a capital case is to be instructed on and permitted to find lesser included non-capital offenses when and only when the evidence provides a factual basis which would support a conviction on the lesser offense instead of on the capital offense.[3]

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[3] If the preclusion of lesser included offenses raised by the evidence is held unconstitutional in Beck v. Alabama, supra, then the question of the severability of the preclusion clause

Therefore, neither Alabama law nor general federal law requires that a jury be permitted to convict on a lesser included offense if there is no factual dispute in the evidence upon which such a conviction can be based. Nor does federal constitutional law require it.

(III) The Constitution Does Not Require That a Jury in a Capital Case be Permitted to Consider Non-Capital Lesser Included Offenses for Which There is No Basis in the Evidence

There is a significant difference between preventing a jury in a capital case from considering a lesser included offense supported by the evidence and preventing it from considering a lesser included offense which has no basis in the evidence. That difference was recognized by the Supreme Court when it limited its grant of certiorari in Beck v. Alabama, supra, to the constitutionality of not permitting a jury to consider a verdict of guilty on a lesser included non-capital offense "when the evidence would have supported such a verdict." The difference is also recognized by petitioner himself who refers on p. 8 of his brief to the "submission to the jury of lesser included offenses that are supported by the evidence". (Emphasis added.)

F.N. 3 cont'd

of section 13-11-2(a) will be an issue of Alabama law. E.g., Morey v. Doud, 354 U.S. 457, n. 16 (1957); Dorchy v. Kansas, 264 U.S. 286, 290 (1924). If it is determined as a matter of Alabama law that the preclusion clause is severed and the rest of the statute remains, then whether the special rule of section 13-1-73 applies to capital indictments would also be a question of Alabama law. See, e.g., Ward v. Illinois, 431 U.S. 767, 772 (1977); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). Therefore, the issue of whether a capital jury must as a matter of state law be permitted to convict on lesser included offenses not supported by the evidence would be a question of Alabama law and not a federal issue. If this state law question should be raised by the outcome in Beck v. Alabama, supra, then certification of it to the Alabama Supreme Court might be appropriate. See, e.g., Bellotti v. Baird, 428 U.S. 132 (1976).

Petitioner did not cite any case, capital or non-capital, which holds that the constitution requires that lesser included offenses be submitted to the jury when there is no factual basis in the evidence for them. Gregg v. Georgia, 428 U.S. 153 (1976), at least implicitly, holds to the contrary. Under the Georgia capital punishment statute upheld in Gregg, "the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence." 428 U.S. at 163. However, the Georgia statute does not require that lesser included offenses be submitted to the jury if they are not supported "by any view of the evidence." The Gregg case is itself an example. Gregg was charged with murder during the course of a robbery. The trial court charged the jury on felony murder, non-felony murder, and on the lesser included offenses of robbery, but it specifically refused to charge on the lesser included offense of manslaughter. 428 U.S. 15 160, 215-216. The Supreme Court expressly noticed that the Georgia Supreme Court had upheld the trial court's refusal to instruct the jury on voluntary manslaughter, "since there was no evidence to support that verdict." 428 U.S. at 161, n. 2 (opinion of Stewart, Powell, and Stevens, J.J.). The Supreme Court upheld the Georgia statute and affirmed the judgment of the Georgia Supreme Court. Therefore, Gregg v. Georgia, supra, establishes that it is not unconstitutional in a capital case to prevent jury from considering lesser included non-capital offenses when there is no evidentiary basis for them.

The Louisiana statute struck down in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 330 (1976), provided that capital juries must be instructed on the non-capital lesser included offenses of second degree murder and manslaughter "whether or

not raised by the evidence." While this was not the reason the statute was held unconstitutional, 428 U.S. at 332, the Roberts plurality did note that such a requirement "plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate," thereby injecting "an element of capriciousness" and permitting the "arbitrary exercise of the capital jury's de facto sentencing discretion." 428 U.S. at 335 (opinion of Stewart, Powell, and Stevens, J.J.). While the quoted words were spoken in a case involving a mandatory statute, the same concerns exist in regard to the operation of non-mandatory statutes.

According to the latest word from the Supreme Court, in order to comply with Furman, capital punishment procedures should not create "a substantial risk that the death penalty would be inflicted in an arbitrary and capricious manner." Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion). Furman requires that sentencing discretion be "directed and limited" so that the death penalty will be imposed in a more consistent and rational manner" and so that there will be a meaningful basis for distinguishing the cases in which it is imposed from the cases in which it is not imposed. Lockett v. Ohio, supra. Permitting the jury in a capital case to convict for a lesser included non-capital offense which has no basis in the evidence will only serve to promote jury nullification and the kind of de facto sentencing discretion which will cause the death penalty to be inflicted in an arbitrary and capricious manner. Instructing a jury to apply the law and decide the case on the basis of the evidence and then giving them a tool which serves no purpose other than to permit them to disregard

the law and evidence is illogical. It does not promote consistent and rational sentencing, but just the opposite. A verdict convicting a defendant of a lesser included offense for which there is no factual basis in the evidence can only be based on caprice or emotion rather than reason. A defendant is not constitutionally entitled to do that.

None of the arguments put forward in petitioner's brief against the preclusion of lesser included offenses supported by the evidence applies to the preclusion of lesser included offenses which have no support in the evidence. Petitioner argues that the preclusion of lesser included offenses denigrates the proof beyond the reasonable doubts standard by encouraging jurors to convict in spite of it. This argument is explicitly premised upon there being at the trial proof beyond a reasonable doubt of a lesser included offense but not of the capital offense itself. That situation, by definition, does not exist in a case like the present one where there is no factual basis for a jury to find that the defendant was guilty of a lesser offense but not of the greater capital offense. Nor does Keeble v. United States, 412 U.S. 205 (1973), support a contrary conclusion. As was discussed previously, in Keeble there was a factual dispute which provided an evidentiary basis for the lesser included offense, and that basis was specifically recognized by the Supreme Court.

Likewise, the equal protection analysis of petitioner yields an entirely different result when applied to the preclusion of lesser included offenses not supported by the evidence. Not permitting a jury to convict on lesser included offenses not supported by the evidence is not only the general rule in Alabama but also in the federal court. It is true that,

until January 1, 1980, Alabama has in effect a special statute requiring that regardless of the evidence juries be instructed on second degree murder in the trial of all non-capital first degree murder indictments. The difference between this rule and the refusal to instruct on lesser included offenses not supported by the evidence in this and other capital cases is justified by the compelling state interest in avoiding jury nullification and promoting consistent, rational and non-arbitrary jury sentencing in capital cases.

Petitioner's 8th Amendment argument is based upon the "uniqueness" of Alabama's preclusion of factually supported lesser included offenses. The rule precluding jury consideration of lesser included offenses not supported by the evidence is not unique. That is the general rule in non-capital cases in this country, and it is the rule in federal courts. Petitioner has cited no cases to validly support the contrary.

The evidence presented at the trial of petitioner, dissimilar to that in Beck, does not factually establish a lesser included offense. Therefore, if Beck is decided adversely to Respondent on the ground upon which certiorari was granted in Beck, such decision would not be dispositive of this case.

CONCLUSION

In concluding the State of Alabama would respectfully note that much of the argument expressed in this brief is adopted from this party's brief to this Honorable Court in Beck, supra and State of Alabama v. Baldwin, submitted on November 27, 1979.

Additionally, we would note that it appears that much of Petitioner's argument seems to be "on the merits" without a discussion of any actual reasons for granting of the writ. Similarly the State of Alabama's brief responds accordingly. We would point out here that no basis has been argued for why the Petition should be granted and therefore we submit it should be denied.

Relatedly, the Petitioner has stated our issue in regard to his right to take the stand without in "argument" being submitted. That issue is therefore not supported to any degree by anything which would justify the granting of this writ.

Based on this argument we respectfully request that the Petition be denied.

Respectfully submitted,

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State of Alabama

Walter S. Turner
Chief Assistant Attorney General

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Special Assistant on the Brief

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AFFIDAVIT OF PROOF OF SERVICE

STATE OF ALABAMA MONTGOMERY COUNTY

I, the undersigned, Assistant Attorney General of Alabama, 64 North Union, Montgomery, Alabama, 36130, hereby certify that I have deposited for service three (3) copies of a brief in opposition to petition for writ of certiorari to Honorable J. L. Chestnut, P. O. Box 1305, Selma, Alabama, 36701, and ten (10) copies to the Clerk of the Supreme Court of the United States.

This the 29th day of January, 1980.

Walter S. Turner

WALTER S. TURNER
CHIEF ASSISTANT ATTORNEY GENERAL
64 North Union
Montgomery, Alabama 36130

SWORN to and subscribed before me the undersigned, this the 29th day of January, 1980.

Ronda L. Cooper

NOTARY PUBLIC